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No. 01-____

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY AND
CITIBANK (SOUTH DAKOTA), N.A.,
Petitioners,

v.

JOHN B. MCCAULEY *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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74 pp

QUESTIONS PRESENTED

1. Whether the cost to the defendant of complying with an injunction sought by a plaintiffs' class may satisfy the amount-in-controversy requirement of the diversity statute, where such compliance would cost the defendant more than the $75,000 minimum whether it covered the entire class or any single member of the class.

2. Whether, for purposes of applying the amount-in-controversy requirement of the diversity statute, a class action claim for punitive damages should be attributed to each member of the class as an undivided whole, or instead must be apportioned to each class member on a *pro rata* basis.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption and to the unidentified class members, Ricky A. Copeland, Gerald Essig, Howard S. & Lynette M. Hornreich, John La Grou, Jeffrey Scott Merrick, and Thomas Walters are parties to the case.

CORPORATE DISCLOSURE STATEMENT

Ford Motor Company has no parent corporation, and no publicly held company owns ten percent or more of its stock. Citibank (South Dakota), N.A. is a wholly-owned subsidiary of Citicorp, and is indirectly wholly-owned by Citigroup, Inc. Citigroup, Inc. is a publicly held company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS AND JUDGMENTS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 5

I. THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS REGARDING THE "EITHER VIEWPOINT" APPROACH TO THE AMOUNT-IN-CONTROVERSY REQUIREMENT IN THE CLASS ACTION CONTEXT 7

A. The Ninth Circuit's Decision Compounds an Existing Intercircuit Conflict 8

B. The Ninth Circuit Misconstrued Both the "Either Viewpoint" Rule and the Dictates of *Snyder* 13

1. The "either viewpoint" rule is the appropriate device for evaluating claims for injunctive relief in the class action context, even when the claims at issue are "separate and distinct." 14

TABLE OF CONTENTS—Continued

2. The requested injunction in this case is better understood as a "common and undivided" claim under *Snyder*. 17

II. THE COURT SHOULD DECIDE THE PROPER TREATMENT OF A CLASS CLAIM FOR PUNITIVE DAMAGES IN THE AMOUNT-IN-CONTROVERSY DETERMINATION. 19

A. The Treatment of Punitive Damages Under the Amount-In-Controversy Requirement Is an Important and Recurring Issue That Has Confused and Divided the Lower Federal Courts. 20

B. The Ninth Circuit Erred in Concluding That the Class Plaintiffs' Request for Punitive Damages Should Be Apportioned Among the Class Members on a Pro Rata Basis. 24

CONCLUSION 29

APPENDIX A: Ninth Circuit's decision in *In re Ford Motor Co./Citibank (North Dakota), N.A. Cardholder Rebate Program Litigation*, Nos. 99-36115 & 99-36206 (Consolidated) filed Sept. 6, 2001 .....1a

APPENDIX B: Ninth Circuit's order denying petitions for rehearing and rehearing en banc in *In re Ford Motor Co./Citibank (North Dakota), N.A. Cardholder Rebate Program Litigation*, Nos. 99-36115 & 99-36206 (Consolidated) filed Oct. 22, 2001 .....21a

APPENDIX C: District Court's decision in *In re Ford Motor Co./Citibank (North Dakota), N.A. Cardholder Rebate Program Litigation*, No. MDL-1199 (W.D. Wash. filed Oct. 29, 1999).....23a

TABLE OF AUTHORITIES

CASES

Page(s)

Alfonso v. Hillsborough County Aviation Authority, 308 F.2d 724 (5th Cir. 1962).....9

Allen v. R&H Oil & Gas Co., 63 F.3d 1326 (5th Cir. 1995).....20, 21, 24, 25, 26

Ard v. Transcontinental Gas Pipe Line Corp., 145 F.3d 361 (5th Cir. 1998).....22

Ard v. Transcontinental Gas Pipe Line Corp., 138 F.3d 596 (5th Cir. 1998).....21

BMW v. Gore, 517 U.S. 559 (1996) 24, 28

Berman v. Narragansett Racing Association, 414 F.2d 311 (1st Cir. 1969) 9

City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 25

Cohen v. Office Depot, Inc., 184 F.3d 1292 (11th Cir. 1999).....22

Cohen v. Office Depot, Inc., 204 F.3d 1069 (11th Cir. 2000), *cert. denied*, 531 U.S. 957 (2001).....22

Crawford v. F. Hoffman La-Roche Ltd., 267 F.3d 760 (8th Cir. 2001).....23

Crosby v. America Online, Inc., 967 F. Supp. 257 (N.D. Ohio 1997).....9, 12

DaimlerChrysler v. Gibson, No. 01-688 (petition filed Nov. 9, 2001).....29

Davies v. Corbin, 112 U.S. 36 (1884) 25, 26, 28

Del Vecchio v. Conseco, Inc., 230 F.3d 974 (7th Cir. 2000).....12

Dickinson v. Petrolum Generation Corp., 338 U.S. 507 (1950) 24

Duhon v. Conoco, Inc., 937 F. Supp. 1216 (W.D. La. 1996).....21

Durang v. Servicemaster Co. Trugreen, Inc., 147 F. Supp. 2d 744 (E.D. Mich. 2001) 23

TABLE OF AUTHORITIES—Continued

Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Electronics, Inc., 120 F.3d 216 (11th Cir. 1997) 8, 9
Gibson v. Shufeldt, 122 U.S. 27 (1887) 15, 26, 28
Gilman v. BHC Securities, Inc., 104 F.3d 1418 (2d Cir. 1997) 23, 25, 27
Government Employees Insurance Co. v. Lally, 327 F.2d 568 (4th Cir. 1964) 9
H&D Tire and Automotive Hardware, Inc. v. Pitney Bowes, Inc., 250 F.3d 302 (5th Cir. 2001) 22
H&D Tire and Automotive Hardware, Inc. v. Pitney Bowes, Inc., 227 F.3d 326 (5th Cir. 2000), *cert. denied*, 122 S. Ct. 214 (2001) 21, 22
Handley v. Stutz, 137 U.S. 366 (1890) 26
Hoffman v. Vulcan Materials Co., 19 F. Supp. 2d 475 (M.D.N.C.1998) 18
Honda v. Oberg, 512 U.S. 514 (1994) 19
Hunt v. Washington State Appel Advertising Commission, 432 U.S. 333 (1977) 8
In re Brand Name Prescription Drugs Antitrust Litigation, 123 F.3d 599 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998) ..... *passim*
In re Cardizem CD Antitrust Litigation, 90 F. Supp. 2d 819 (E.D. Mich. 1999) 12, 18
In re Corestates Trust Fee Litigation, 39 F.3d 61 (3d Cir. 1994) 9
In re Ford Motor Co./Citibank (North Dakota), N.A. Cardholder Rebate Program Litigation, 264 F.3d 952 (9th Cir. 2001) ..... *passim*
In re Ford Motor Co./Citibank (North Dakota), N.A. Cardholder Rebate Program Litigation, No. MDL-1199, slip op. (W.D. Wash. Oct 29, 1999) 1
In re Microsoft Corp. Antitrust Litigation, 127 F. Supp. 2d 702 (D. Md. 2001) 12, 19

TABLE OF AUTHORITIES—Continued

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995) 13
John Hancock Mutual Life Insurance Co. v. Bartels, 308 U.S. 180 (1939) 24
Justice v. Atchison, Topeka & Santa Fe Railway, 927 F.2d 503 (10th Cir. 1991 9
Smith v. Washington, 593 F.2d 1097 (D.C. Cir. 1978) 9
Kanter v. Warner-Lambert Co., 265 F.3d 853 (9th Cir. 2001) 13
Kheel v. Port N.Y. Authority, 457 F.2d 46 (2d Cir.), *cert. denied*, 409 U.S. 983 (1972) 9
Kivikovski v. Smart Professional Photocopying Corp., 2001 WL 274763 12
Knauer v. Ohio State Life Insurance Co., 102 F. Supp. 2d 443 (N.D. Ohio 2000) 23
Lauchheimer v. Gulf Oil, 6 F. Supp. 2d 339 (D.N.J. 1998) 23
Lindsey v. Alabama Telephone Co., 576 F.2d 593 (5th Cir. 1978) 21
Lonnquist v. J.C. Penney Co., 421 F.2d 597 (10th Cir.1970) 11
Maggio v. Zeitz, 333 U.S. 58 (1948) 24
Martin v. Franklin Capital Corp., 251 F.3d 1284 (10th Cir. 2001) 23
Massachusetts St. Pharmaceutical Ass'n v. Federal Prescription Services, Inc., 431 F.2d 130 (8th Cir. 1970) 9, 11
Mattingly v. Hughes Electronics Corp., 107 F. Supp. 2d 694 (D. Md. 2000) 23
McCoy v. Erie Insurance Co., et al., 147 F. Supp. 2d 481 (S.D.W.Va. 2001) 12
Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991) 24

TABLE OF AUTHORITIES—Continued

Packard v. Provident National Bank, 994 F.2d 1039 (3d Cir.), *cert. denied*, 510 U.S. 964 (1993).....10
Ridder Bros., Inc. v. Blethen, 142 F.2d 395 (9th Cir. 1944).....9
Sellers v. O'Connell, 701 F.2d 575 (6th Cir. 1983).....26
Sharapata v. Town of Islip, 452 N.Y.2d 357 (1982).....25
Shields v. Thomas, 58 U.S. (17 How.) 3 (1855).....25, 26
Smith v. GTE Corp., 236 F.3d 1292 (11th Cir. 2001).....22
Snow v. Ford Motor Co., 561 F.2d 787 (9th Cir. 1977).....10
Snyder v. Harris, 394 U.S. 332 (1969).....*passim*
TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993).....19. 28
Tapscott v. MS Dealer Service Corp., 77 F.3d 1353 (11th Cir. 1996).....22, 24
Texas & Pacific Railway Co. v. Gentry, 163 U.S. 353 (1896).....26
Veeder v. Kennedy, 589 N.W.2d 610 (S.D. 1999).....25
Zahn v. International Paper Co., 414 U.S. 291 (1973).....1

STATUTES & RULES

28 U.S.C. § 1254(1).....1
28 U.S.C. § 1332.....1, 5, 8, 19
28 U.S.C. § 1367.....29
28 U.S.C. § 1447(d).....7
Ga. Code § 51-12-5.1(e)(2).....25
Federal Rule of Civil Procedure 23.....1

TABLE OF AUTHORITIES—Continued

BOOKS, ARTICLES & TREATISES

Page

14B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* (1998).....2, 3, 9, 10, 14
15 James Wm. Moore, *Moore's Federal Practice* (3d ed. 2001).....9, 14
Chemerinsky, Erwin, *Federal Jurisdiction* (2d ed. 1994).....10
Dobie, Armistead M., *Jurisdictional Amount in the United States District Court*, 38 Harv. L. Rev. 733 (1925).....10
Fallon, Richard H., Jr. et al., *Hart and Wechsler's The Federal Court and the Federal System* (4th ed. 1996).....10, 15, 16
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PETITION FOR A WRIT OF CERTIORARI

Petitioners Ford Motor Company and Citibank (South Dakota), N.A. respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND JUDGMENTS BELOW

The opinion of the Ninth Circuit (Pet. App. 1a-20a) is reported at 264 F.3d 952. The opinion of the district court (Pet. App. 23a-33a) is not reported.

JURISDICTION

The opinion of the Court of Appeals was issued on September 6, 2001. The Court of Appeals denied the petition for rehearing and rehearing en banc on October 22, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1332(a)(1) of Title 28, United States Code, provides in pertinent part: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interests and costs, and is between . . . citizens of different States . . . ."

STATEMENT OF THE CASE

In *Snyder v. Harris*, 394 U.S. 332 (1969), and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), this Court held that the advent of the modern class action under Rule 23 failed to alter the traditional rule that "separate and distinct claims of two or more plaintiffs cannot be aggregated in order to satisfy the jurisdictional amount requirement" of the diversity statute. 394 U.S. at 335. As the Court explained, however, the claims of multiple plaintiffs may be attributed to the class as an undivided whole where the plaintiffs "unite to enforce a single title or right in which they have a common and undivided interest." *Id.*

Because both cases were presented in this Court on the assumption that the plaintiffs alleged "separate and distinct" claims, neither *Snyder* nor *Zahn* elaborates the circumstances in which a claim is properly classified as "separate and distinct" or "common and undivided." And the Court has had no occasion to revisit the issue in the intervening thirty years. The result, the leading treatise in the area explains, is that the "rules relating to aggregating multiple claims to satisfy the amount in controversy requirement are in a very unsatisfactory state," and "the distinction between a common, undivided interest and several and distinct claims is far from clear." 14B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* ("Wright & Miller") § 3704, at 127, 150 (1998). This case affords the Court the opportunity to provide much-needed guidance on the issue, in the specific context of two recurring situations that have confused and divided the lower courts: a class claim for injunctive relief, and a class claim for punitive damages.

The claim for injunctive relief in this case raises an additional question that has similarly divided the lower courts for years: whether, for purposes of determining the amount in controversy in a diversity suit, a claim may be evaluated not only in terms of its value to the plaintiff or plaintiffs, but, alternatively, in terms of its cost to the defendant. The Court has never conclusively addressed this question, and the lower courts are deeply divided on it. *See* 14B Wright & Miller § 3703. The conflict is particularly confounding in the class action context, where courts must address the issue while also adhering to *Snyder* and *Zahn*. Guidance from the Court on this question is critical, and this case presents an excellent vehicle in which to provide it.

1. This case arises out of the termination of a credit card rebate program operated by Petitioners Ford Motor Company and Citibank (South Dakota), N.A. In 1993, Petitioners issued a credit card that enabled its users to earn rebates towards the purchase of a new Ford vehicle. Pet. App. 3a. Petitioners discontinued the program effective January 1, 1998. In response, cardholders filed six nationwide class actions in the state courts of Washington, Oregon, California, Illinois, Alabama, and New York. *Id.* The suits alleged generally that one or both Petitioners had made misrepresentations concerning the rebate program, and that the program had been wrongfully terminated. *Id.*

Petitioners removed the cases to federal court on the basis of diversity jurisdiction, and then petitioned the Judicial Panel on Multidistrict Litigation for consolidation of the actions in one district court. The Panel transferred the actions to the Western District of Washington for consolidated pretrial proceedings. The named plaintiffs in the various actions then jointly filed a Consolidated Complaint. The Consolidated Complaint stated that the case was within the district court's diversity jurisdiction, *id.* at 4a; it sought as relief, *inter alia*, punitive damages and an injunction reinstating the rebate program for the class members, *id.*; and it alleged that Petitioners' liability to the class amounted to billions of dollars, *id.* at 13a.

Following completion of discovery on the question of class certification, the district court *sua sponte* issued an order to show cause why the Consolidated Complaint "should not be dismissed for lack of jurisdiction," for failure to establish the $75,000 amount-in-controversy requirement. *Id.* at 4a.[1] Two of Petitioners' arguments in response to the court's order are relevant here: (1) that the plaintiffs have a common and undivided interest in the request for an injunction reinstituting the program, and Petitioners' cost of complying with that request exceeds $75,000 even for a single plaintiff; and (2) that the plaintiffs have a common and undivided interest in the request for punitive damages, which also exceeds

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[1] It is undisputed that the Consolidated Complaint satisfies the requirement of complete diversity among the parties. Pet. App. 6a.

$75,000. The district court rejected those arguments and dismissed the Consolidated Complaint for lack of jurisdiction. *Id.* at 4a-5a.

2. The Ninth Circuit affirmed in part and dismissed in part.

a. The panel first addressed Petitioners' contention that the cost of complying with Respondents' request for injunctive relief satisfies the amount-in-controversy requirement. The court did not dispute that it would cost Petitioners more than $75,000 to reinstitute and operate the rebate program. The court also acknowledged that, under the "either viewpoint rule," "the test for determining the amount in controversy is the pecuniary result to *either party* which the judgment would directly produce." *Id.* at 7a (emphasis added). As a result, even if the value of injunctive relief to the plaintiff does not exceed $75,000, the amount-in-controversy threshold still might be satisfied based on "the potential cost to the defendant of complying with the injunction." *Id.* In the court's view, however, the "either viewpoint" rule applies in class actions (and other multiple plaintiff cases) only in circumstances in which the plaintiffs have a "common and undivided interest" in the requested injunction. *Id.* at 9a. If it were otherwise, the court believed, plaintiffs could too easily subvert the non-aggregation principle of *Snyder* and *Zahn*. *Id.*

Here, the court held, the plaintiffs did not possess a "common and undivided" interest in the request for an injunction reinstituting the rebate program. The principal basis for that conclusion was that the right asserted by the plaintiffs —*viz.*, "to accrue rebates under the canceled program"—was "distinct to each plaintiff" and "based on his or her individual contractual relationship with Ford and Citibank." *Id.* at 11a. The court found irrelevant the undisputed fact that the fixed cost to Petitioners of complying with the injunction would exceed $75,000 even as to any *single* plaintiff. *Id.* at 12a. In the court's view, establishing jurisdiction on that basis would

conflict with "the principle underlying the jurisdictional amount requirement—to keep small diversity suits out of federal court." *Id.* The court therefore determined that "the amount in controversy requirement cannot be satisfied by showing that the fixed administrative costs of compliance exceed $75,000." *Id.*

b. The Ninth Circuit also rejected Petitioners' argument that the plaintiffs' class possesses a common and undivided interest in the request for punitive damages. The court focused on whether "the consolidated plaintiffs and putative class members unite to assert a single title or right." *Id.* at 16a. Claims for punitive damages, the court reasoned, "are brought together in a class action for the convenience of the plaintiffs, not because the plaintiffs share a common and undivided interest in a single, indivisible res." *Id.* at 17a. As a result, the court found, "the right to punitive damages is a right of the individual plaintiff, rather than a collective entitlement of the victims of the defendant's misconduct." *Id.* (internal quotation marks omitted). In reaching that conclusion, the court emphasized that a plaintiff's recovery of punitive damages is not limited by prior awards of punitive damages to other plaintiffs for the same act, and also that "[e]ach consolidated plaintiff and class member could bring an individual action for punitive damages and have his or her rights adjudicated without implicating the rights of every other person claiming such damages." *Id.*

REASONS FOR GRANTING THE WRIT

This case presents two important questions of federal jurisdiction that have divided and confused the lower federal courts for years, and that are ripe for this Court's review. Both questions concern the scope of federal jurisdiction in diversity cases pursuant to 28 U.S.C. § 1332, and in particular the appropriate methods for assessing in a diversity class action whether "the matter in controversy exceeds the sum or value of $75,000." 28 U.S.C. § 1332(a).

One of the questions presented—whether the cost to a defendant of complying with a class claim for injunctive relief may satisfy section 1332's amount-in-controversy requirement, where such compliance would cost the defendant more than $75,000 whether it covered the entire class or any single class member—itself implicates a number of connected and important questions warranting this Court's review. The first of these is a question over which the courts of appeals have sharply divided for years: In cases where an injunction is requested, may the amount in controversy be evaluated only by looking at the *value* of the injunction to the plaintiff (the "plaintiff's viewpoint" rule), or may courts also consider the *cost* to the defendant of complying with the injunction (the "either viewpoint" rule)? Relatedly, if the "either viewpoint" rule is appropriate as a general matter, may it be employed in the class action setting without running afoul of the rule announced by this Court in *Snyder* that class members may not aggregate their "separate and distinct" claims to satisfy the amount-in-controversy requirement? The lower courts have diverged markedly in their understanding and application of *Snyder*'s dictates, particularly where injunctive relief and the "either viewpoint" rule are at issue. Moreover, the holding of the Ninth Circuit below that the "either viewpoint" rule cannot be applied consistently with *Snyder* both misconceives the non-aggregation principle and ignores the substantial sum actually at stake in the class claim for injunctive relief in this case. This Court's intervention is warranted to restore consistency and coherence to the law in this area.

The second question presented concerns the treatment of a class claim for punitive damages in the amount-in-controversy determination. In particular, does the class have a "common and undivided" interest in the entire punitive damages award, or does each class member have a "separate and distinct" claim for a *pro rata* share of the punitive damages award? Those panel opinions in the courts of appeals that have analyzed the merits of the question have reached

opposite conclusions, and the district courts are divided. In addition, the position adopted by the Ninth Circuit below and shared by other courts of appeals is decidedly in error: the view of those courts—*i.e.*, that each class member has a "separate and distinct" claim for a *pro rata* (and jurisdictionally insufficient) share of the class-wide punitive damages award—necessarily depends on the unsustainable premise that no class member could obtain $75,000 in punitive damages in an individual action. That erroneously restrictive interpretation of the scope of diversity jurisdiction warrants this Court's immediate correction, especially in view of the Court's repeated expressions of concern with the danger of arbitrarily excessive punitive damages awards against out-of-state businesses.

Finally, the Court should grant the petition in this case because opportunities to review these important issues do not often arise. Under 28 U.S.C. § 1447(d), "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." Accordingly, the bulk of district court decisions in this area are subject to no appellate review at all. This case is an exception to that rule because, as the court of appeals discussed, the original complaints filed in various state courts and then removed to federal court were replaced by a Consolidated Complaint filed in the district court, and the district court's order dismissed, rather than remanded, the action as defined in that Consolidated Complaint. *See* Pet. App. 5a-6a. Thus, especially because the Court so rarely has the opportunity to review the issues presented here, the petition should be granted.

I. THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS REGARDING THE "EITHER VIEWPOINT" APPROACH TO THE AMOUNT-IN-CONTROVERSY REQUIREMENT IN THE CLASS ACTION CONTEXT.

A principal ground of diversity jurisdiction asserted by Petitioners and rejected by the court below is that section

1332's amount-in-controversy requirement is satisfied because the cost to Petitioners of complying with the injunctive relief sought by the plaintiff class—reinstatement of the rebate program and restoration of the opportunity to accrue rebates—would exceed $75,000 even if the requested relief were awarded only to one plaintiff. The Ninth Circuit's rejection of that argument is incorrect on the merits, and it compounds a deep division among the courts of appeals over the appropriate method for evaluating the amount in controversy in class actions seeking injunctive relief.

A. The Ninth Circuit's Decision Compounds an Existing Intercircuit Conflict.

1. In diversity suits where the requested relief includes an injunction against the defendant, a recurring question is whether the amount in controversy must be evaluated by looking only to the value of the case to the plaintiff (the "plaintiff's viewpoint rule"), or whether it may also be determined by considering the cost to the defendant of complying with the requested injunction (the "either viewpoint rule"). The question arises in cases like this one, where complying with the requested injunction would require the defendant to alter its business activities in such a manner that would cost at least the statutory minimum under 28 U.S.C. § 1332, even though the value of the injunction to each individual plaintiff is less than the minimum.

This Court has never conclusively addressed this issue,[2] and the lower courts across the country are deeply divided on it. *See Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Elecs., Inc.*, 120 F.3d 216, 218

[2] The Court has, however, approved the use of "compliance costs" when calculating the amount in controversy in related contexts. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 347 (1977) (holding that, for purposes of satisfying the federal question statute's now-repealed $10,000 threshold, the plaintiffs' "costs of compliance" with the challenged state statute "are properly considered in computing the amount in controversy).

(11th Cir. 1997) ("The Supreme Court has provided no clear guidance on this question, and, as a result, federal courts are divided as to the proper perspective to use in determining the amount in controversy.") (footnote omitted); 14B Wright & Miller § 3703 (discussing the conflict and collecting cases); 15 James Wm. Moore *et al.*, *Moore's Federal Practice* ("*Moore's*") § 102.109 (3d ed. 2001) (same).

On one hand, several courts—including the Second, Third, Fifth, Eighth, and Eleventh Circuits—have adopted the "plaintiff's viewpoint" rule, and consider only the value of the injunction to the plaintiff. *See Ericsson GE Mobile*, 120 F.3d at 219; *In re Corestates Trust Fee Litig.*, 39 F.3d 61, 65 (3d Cir. 1994); *Kheel v. Port N.Y. Auth.*, 457 F.2d 46, 49 (2d Cir.), *cert. denied*, 409 U.S. 983 (1972); *Massachusetts State Pharm. Ass'n v. Federal Prescription Serv., Inc.*, 431 F.2d 130, 132 n.1 (8th Cir. 1970); *Alfonso v. Hillsborough County Aviation Auth.*, 308 F.2d 724, 727 (5th Cir. 1962). On the other hand, a growing number of courts—including the First, Fourth, Seventh, Tenth, and D.C. Circuits, along with the Ninth Circuit in some circumstances as discussed below—disagree, and hold instead that the amount-in-controversy requirement may be satisfied by evaluating the case from either the plaintiff's or the defendant's viewpoint. *See Justice v. Atchison, Topeka & Santa Fe Ry.*, 927 F.2d 503, 505 (10th Cir. 1991); *Smith v. Washington*, 593 F.2d 1097, 1099 (D.C. Cir. 1978); *Berman v. Narragansett Racing Ass'n*, 414 F.2d 311, 314 (1st Cir. 1969); *Government Employees Ins. Co. v. Lally*, 327 F.2d 568, 569 (4th Cir. 1964); *Ridder Bros., Inc. v. Blethen*, 142 F.2d 395, 399 (9th Cir. 1944); *see also Crosby v. America Online, Inc.*, 967 F. Supp. 257, 264 (N.D. Ohio 1997). In total, almost all the courts of appeals have weighed in on the "viewpoint" issue, and the result is a roughly even split among the circuits that is clearly ripe for resolution by this Court.[3]

[3] Scholarly opinion is also divided. The "plaintiff's viewpoint" rule has enjoyed notable academic support in the past, *see, e.g.*, Armistead M.

2. This disagreement is further complicated in the class action context, where the courts are divided over whether, and how, the "either viewpoint" rule can be applied consistent with *Snyder*. Here, the court of appeals observed that the "either viewpoint" rule has long been the law of the Ninth Circuit. Pet. App. 7a (citing *Ridder*, 142 F.2d at 399). But the court refused to apply that rule in the class action context of this case, on the ground that to do so would run afoul of the principle articulated in *Snyder* that individual class members may not aggregate their separate and distinct claims to meet section 1332's jurisdictional threshold. *Id.* at 11a-12a.

Several courts agree with the Ninth Circuit's identification of an "inherent conflict between the 'either viewpoint' rule and [*Snyder*'s] non-aggregation rule," Pet. App. 8a (citing *Snow v. Ford Motor Co.*, 561 F.2d 787, 788-91 (9th Cir. 1977)), and conclude therefore that the former may never be employed in cases involving "separate and distinct" claims. Courts taking this view tend to understand the "either viewpoint" approach as necessarily involving a process of aggregation, whereby the separate costs to the defendant of complying with injunctions for each individual plaintiff are added together to determine the total burden on the defendant. Unless the plaintiff class asserts a "common and undivided" claim, these courts reason, such aggregation is impermissible under *Snyder*. *See, e.g.*, *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1050 (3d Cir.) ("[A]llowing the amount in controversy to be measured by the defendant's cost would eviscerate *Snyder*'s holding that the claims of class members may not be aggregated in order to meet the jurisdictional

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Dobie, *Jurisdictional Amount in the United States District Court*, 38 Harv. L. Rev. 733 (1925), but contemporary scholarly opinion tends to favor the "either viewpoint" approach, *see, e.g.*, 14B Wright & Miller § 3703, at 121-25; Richard H. Fallon, Jr. *et al.*, *Hart and Wechsler's The Federal Court and the Federal System* ("*Hart & Wechsler*")1550 (4th ed. 1996); Erwin Chemerinsky, *Federal Jurisdiction* § 5.3.4 (2d ed. 1994); Brittain Shaw McInnis, Comment, *The $75,000.01 Question: What is the Value of Injunctive Relief?*, 6 Geo. Mason L. Rev. 1013 (1998).

threshold."), *cert. denied*, 510 U.S. 964 (1993); *Massachusetts State Pharm. Ass'n*, 431 F.2d at 132 & n.2 (concluding that, for class actions, *Snyder* "can only be interpreted as precluding the valuation of the amount in controversy from the defendant's viewpoint. To hold otherwise would in effect permit aggregation of claims contrary to the teaching of *Snyder*."); *Lonnquist v. J.C. Penney Co.*, 421 F.2d 597, 599 (10th Cir. 1970) (equating the "either viewpoint" approach with looking to the "total detriment" to the defendant, and holding that, in cases which involve "separate and distinct claims that cannot be aggregated, it would be improper to look to total detriment").[4]

Other courts reject that approach and instead harmonize the "either viewpoint" rule with the *Snyder* non-aggregation principle even where the plaintiffs' claims are "separate and distinct." In *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998), for example, the Seventh Circuit acknowledged the "[c]oncern . . . that if the cost to the defendant may be used to establish the minimum amount in controversy in [a class action] injunction case, . . . the nonaggregation rule will be circumvented." *Id.* at 610. Writing for the court, Judge Posner explained that this concern is "misplaced," because evaluating a claim for injunctive relief from the defendant's viewpoint need not mean examining the *total* cost to the defendant of complying with the injunction for the *entire* plaintiff class. *Id.*

Rather, the Seventh Circuit applied the "either viewpoint" rule together with *Snyder* and concluded that the correct standard is "the cost to each defendant of an injunction running in favor of one plaintiff." *Id.* In that context, application of the "either viewpoint" rule means that "[t]he defendant . . . is deemed to face multiple claims for injunctive re-

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[4] Of course, courts that reject the "either viewpoint" rule even in single-plaintiff cases, *see supra* p. 9, necessarily reject it in this context also.

lief, each of which must be separately evaluated." *Id.*; *accord Del Vecchio v. Conseco, Inc.*, 230 F.3d 974, 977-78 (7th Cir. 2000). A number of other courts follow this approach. *See In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 719 n.16 (D. Md. 2001) ("Of course, the cost to the defendant of an injunction running in favor of one plaintiff will often be used as the test to determine the amount in controversy in class actions and other multi-plaintiff cases."); *In re Cardizem CD Antitrust Litig.*, 90 F. Supp. 2d 819, 834-35 (E.D. Mich. 1999) (adopting the *In re Brand Name* approach); *see also McCoy v. Erie Ins. Co., et al.*, 147 F. Supp. 2d 481, 494 n.14 (S.D. W. Va. 2001); *Kivikovski v. Smart Prof'l Photocopying Corp.*, No. 00-524-B, 2001 WL 274763, at *2 (D.N.H. Feb. 20, 2001); *Crosby v. America Online, Inc.*, 967 F. Supp. at 265.

3. In this case, the Ninth Circuit purported to agree with the Seventh Circuit's general approach in *In re Brand Name*. It first observed that, in cases where the plaintiffs assert a "common and undivided" interest in a particular benefit, the cost to the defendant of complying with an injunction vindicating that entire interest (*i.e.*, the "total detriment" referred to in cases cited *supra* pp. 10-11) may be used to satisfy the amount-in-controversy requirement. Pet. App. 9a. The court further noted that, where the claims at issue are "separate and distinct," the amount-in-controversy requirement may be satisfied by looking at "the cost to the defendant of an injunction running in favor of one plaintiff." *Id.* (citing *In re Brand Name*, 123 F.3d at 610).

Ultimately, however, the Ninth Circuit created a new exception to this latter principle. After acknowledging that, in this case, "the cost of an injunction running in favor of one plaintiff would exceed $75,000," *id.* at 12a, the court concluded that premising diversity jurisdiction on that ground would be "fundamentally violative of the principle underlying the jurisdictional amount requirement—to keep small diversity suits out of federal court," *id.* Having interposed that

new principle into the analysis, the Ninth Circuit determined categorically that "the amount in controversy requirement cannot be satisfied by showing that the fixed administrative costs of compliance exceed $75,000." *Id.* That holding conflicts directly with *In re Brand Name* and its progeny, and also implicates the broader intercircuit division over the propriety of ever using the "either viewpoint" rule to evaluate the amount in controversy. The conflict is confirmed by a subsequent decision of the Ninth Circuit issued only four days after the decision in this case, where the court expressly rejected a party's reliance on *In re Brand Name*. *See Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 860 (9th Cir. 2001).

In sum, the Ninth Circuit's treatment of the "either viewpoint" rule deepens the division among the courts of appeals over the viability of that rule, and its rejection of the *In re Brand Name* approach compounds the confusion—even among those courts that generally apply the "either viewpoint" rule—over whether, and how, to apply the rule in the class action context while also abiding by the *Snyder* nonaggregation principle. These conflicts show no sign of abating; they breed confusion over matters of recurring concern to the lower federal courts; and they require conclusive resolution by this Court. *Cf. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 549 (1995) (Thomas, J., concurring in the judgment) (observing that "clear, bright-line" jurisdictional rules "ensure[] that judges and litigants will not waste their resources in determining the extent of federal subject-matter jurisdiction").

B. The Ninth Circuit Misconstrued Both the "Either Viewpoint" Rule and the Dictates of *Snyder*.

The Ninth Circuit's treatment of the cost-of-compliance issue is also seriously flawed on the merits. This Court's review is warranted both to clarify the proper application of the "either viewpoint" rule in the class action context, and to dispel some of the confusion in the lower courts concerning the dictates of *Snyder*.

1. The "either viewpoint" rule is the appropriate device for evaluating claims for injunctive relief in the class action context, even when the claims at issue are "separate and distinct."

As a general matter, it is "desirable" to permit section 1332's amount-in-controversy requirement to be satisfied by either the value of the claim to the plaintiff or the cost of the claim to the defendant, since "the purpose of a jurisdictional amount in controversy requirement—to keep trivial cases away from the federal court system—is satisfied when the case is worth a large sum of money to either party." 14B Wright & Miller § 3703, at 121, 124; *accord* 15 *Moore's* § 102.109[4], at 102-200 ("Because the jurisdictional amount was enacted primarily to measure substantiality of the suit, the question of whether the controversy is substantial should not be answered unqualifiedly by looking only to the value of that which the plaintiff stands to gain or lose."). As noted above, *see supra* p. 9, a substantial number of the lower courts take this approach at least in single-plaintiff cases.

The situation is somewhat more complicated in the class action context, in light of the non-aggregation principle articulated in *Snyder*. Under that rule, class members may not aggregate their "separate and distinct" claims in order to meet section 1332's amount-in-controversy threshold. *See Snyder*, 394 U.S. at 335. To hold otherwise, the Court in *Snyder* observed, "would seriously undercut the purpose of the jurisdictional amount requirement," in that any sufficiently large plaintiff class could collectively satisfy the jurisdictional threshold even though their individual claims were each worth very little. *Id.* at 340. The same principle necessarily applies when evaluating claims for injunctive relief based on the defendant's cost of compliance: If the claims are "separate and distinct," then the total cost to the defendant of complying with an injunction for all plaintiffs cannot be used to satisfy the amount-in-controversy requirement. As the court below recognized, a contrary rule would allow "plaintiffs with minimal damages . . . [to] dodge the non-aggregation rule by praying for an injunction." Pet. App. 9a.

But the obverse is surely true as well. Just as the non-aggregation rule ensures that class action joinder does not create federal jurisdiction where it would not otherwise exist, *see Gibson v. Shufeldt*, 122 U.S. 27, 30 (1887) ("joinder . . . does not enlarge [federal] jurisdiction"), a proper application of *Snyder* should not *eliminate* federal jurisdiction over claims for injunctive relief that, if brought individually and evaluated with the "either viewpoint" rule, *would* satisfy the jurisdictional threshold. Rather, as the Seventh Circuit in *In re Brand Name* explained, courts may evaluate separate and distinct claims for injunctive relief from the defendant's perspective without running afoul of *Snyder* by examining whether "the cost to [the] defendant of an injunction running in favor of *one plaintiff*" would meet the threshold amount. 123 F.3d at 610 (emphasis added); *see also* cases cited *supra* p. 12. This approach retains the virtues of the "either viewpoint" rule by recognizing that the potential cost to the defendant is a "critical" expression of the amount at stake in a case. *Hart & Wechsler* at 1550. At the same time, it preserves the integrity of the amount-in-controversy requirement as demanded by the *Snyder* non-aggregation principle. *See* Brittain Shaw McInnis, Comment, *The $75,000.01 Question: What Is the Value of Injunctive Relief?* 6 Geo. Mason L. Rev. 1013, 1045-46 (1998).

In this case, uncontested record evidence establishes that the fixed cost to Petitioners of complying with an order providing the injunctive relief sought by the plaintiff class—reinstatement of the rebate program and restoration of the opportunity to accrue rebates—would far exceed the jurisdictional minimum of $75,000, even if the relief were awarded

only to a single plaintiff.[5] The Ninth Circuit acknowledged this fact, noting that "the cost of an injunction running in favor of one plaintiff would exceed $75,000," and that, indeed, "the fixed costs to Ford and Citibank of reinstating and maintaining the program would be the same whether it is done for one plaintiff or for six million." Pet. App. 12a. Assuming *arguendo* that the plaintiffs in this case present "separate and distinct" claims for injunctive relief,[6] these facts are sufficient under the "either viewpoint" rule as applied by *In re Brand Name* and its progeny to satisfy section 1332's amount-in-controversy requirement.

The Ninth Circuit, however, categorically rejected the approach taken by the Seventh Circuit and other courts, asserting without explanation that the approach is "fundamentally violative of the principle underlying the jurisdictional amount requirement—to keep small diversity suits out of federal court." Pet. App. 12a. Yet the court nowhere explained what constitutes a "small diversity suit" in its estimation, or how this case could possibly constitute such a suit. In fact, *In re Brand Name* and its progeny provide a method for taking account of the substantial sums actually at stake in this case, and the Ninth Circuit's rejection of that method led it to ignore a "critical" expression of the case's value. *Hart & Wechsler* at 1550.

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5 Because no individual plaintiff could be entitled to anything more than the *opportunity* to accrue rebates—as distinct from an award of any fixed dollar amount—the cost of establishing the business apparatus for tracking the accrual of rebates, maintaining the computer systems for identifying purchases that qualify for rebate accrual, and paying the salaries of persons operating the rebate program will arise if the requested injunction is awarded to even a single plaintiff.

6 As discussed *infra* pp. 17-19, the request for injunctive relief in this case can be understood as a claim based on a "common and undivided" interest among all members of the plaintiff class. But the case clearly satisfies section 1332's amount-in-controversy requirement even if it is deemed to present "separate and distinct" claims.

The Ninth Circuit appears to have been concerned to avoid a rule under which "'every case, however trivial, against a large company would cross the threshold.'" Pet. App. 12a (quoting *In re Brand Name*, 123 F.3d at 610). But proper application of the "either viewpoint" rule as outlined in *In re Brand Name* would not yield that result. The concern in this area is that "a defendant's clerical or ministerial costs of compliance [with a requested injunction] might carry a case across the threshold." *In re Brand Name*, 123 F.3d at 610. The costs associated with the injunction sought here, however, are more than merely "clerical" or "ministerial." In order to comply with the injunction sought by the plaintiff class in this case, Petitioners Ford and Citibank would have to reinstate the rebate program by reestablishing the business apparatus for tracking the accrual of rebates, maintaining computer systems for verifying which purchases qualify for rebate accrual, and paying the salaries of individuals engaged in the operation of the rebate program. Taking account of such structural and operational costs hardly risks opening the federal courts to a flood of trivial litigation. *See In re Brand Name*, 123 F.3d at 610 (contrasting costs requiring the defendant to "restructure its business or give up a lucrative lawful business opportunity" with "clerical or ministerial costs of compliance").

2. The requested injunction in this case is better understood as a "common and undivided" claim under *Snyder*.

As noted, the *Snyder* non-aggregation principle applies only to claims that are "separate and distinct," and does not apply to claims asserting "common and undivided" interests in a particular right or benefit. 394 U.S. at 335. Indeed, a rule about aggregation makes no conceptual sense when applied to common and undivided claims, because such claims cannot be *dis*aggregated in the first place. Accordingly, where plaintiffs "unite to enforce a single title or right in which they have a common and undivided interest," *id.*, the

value of the entire claim may be considered for purposes of section 1332's amount-in-controversy requirement. As the Ninth Circuit correctly observed, *see* Pet. App. 9a, this principle applies with equal force to common and undivided claims for injunctive relief that are evaluated in terms of their cost to the defendant. The court failed to recognize, however, that the plaintiffs' request for injunctive relief in this case is better understood as asserting a "common and undivided" interest.

Here, it is undisputed that the "fixed costs to Ford and Citibank of reinstating and maintaining the program would be the same whether it is done for one plaintiff or for six million." *Id.* at 12a. That is, the class claim for injunctive relief seeks a single result—reinstatement of the rebate program—and the cost and nature of providing that result does not depend on the number of plaintiffs seeking it. This fixed compliance cost is a hallmark of a claim asserting a "common and undivided" interest. *See, e.g., In re Cardizem Antitrust Litig.*, 90 F. Supp. 2d at 836 ("Plaintiffs seek injunctive relief that will benefit the class as a whole. Defendants' costs of compliance do not depend upon the size of the class or the identity of its members. Accordingly, it is based upon a common and undivided interest and constitutes an integrated claim."); *Hoffman v. Vulcan Materials Co.*, 19 F. Supp. 2d 475, 483 (M.D.N.C. 1998) ("[B]ecause the defendant will sustain this loss even if only one plaintiff were to obtain the injunction, this is a case where plaintiffs have an undivided interest in the injunction . . . .").

In this sense, the same facts that satisfy the amount-in-controversy standard under the *In re Brand Name* approach to "separate and distinct" claims also establish that the claim here is "common and undivided." Because Petitioners cannot comply with the injunction for a single plaintiff without also incurring the expense necessary to comply with the injunction for the entire plaintiff class, and because that expense far exceeds the jurisdictional minimum under section

1332, the amount-in-controversy threshold is met whether the claims at issue are understood to be "separate and distinct" or "common and undivided." *See In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d at 719 n.16 ("[I]n a case such as this where an injunction in favor of a single plaintiff—compliance with which would cost the defendant in excess of the jurisdictional amount—would provide the same benefit to all other plaintiffs, the [*In re Brand Name*] test yields a result consonant with the purpose of the common and undivided interest exception.").

II. THE COURT SHOULD DECIDE THE PROPER TREATMENT OF A CLASS CLAIM FOR PUNITIVE DAMAGES IN THE AMOUNT-IN-CONTROVERSY DETERMINATION.

"Punitive damages pose an acute danger of arbitrary deprivation of property," this Court has explained, because "juries [may] use their verdicts to express biases against big businesses, particularly those without strong local presences." *Honda v. Oberg*, 512 U.S. 415, 432 (1994).[7] Those circumstances—cases involving substantial sums and the potential for bias against a nonresident business—present a textbook case for the exercise of diversity jurisdiction. That is especially so in a class action, where claims for punitive damages frequently seek staggering amounts. Because out-of-state defendants almost invariably attempt removal to federal court in those circumstances, scores of lower courts have addressed whether a class action seeking punitive damages is an action where "the matter in controversy exceeds the sum or value of $75,000." 28 U.S.C. § 1332(a). The substantial

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[7] *See also TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464 (1993) (plurality) (discussing risk that punitive damages award may be "influenced by prejudice against large corporations", and emphasizing that risk is "of special concern when the defendant is . . . a nonresident"); *id.* at 493 (O'Connor, J., dissenting) ("temptation to transfer wealth from out-of-state corporate defendants to in-state plaintiffs can be quite strong" in cases involving claim for punitive damages).

sums necessarily involved might suggest that class claims for punitive damages readily satisfy the amount-in-controversy requirement. But the issue has generated substantial confusion, with most courts adopting the opposite view.

This Court should resolve the issue not only because it is important and has generated confusion in the lower courts, but also because the view adopted by the Ninth Circuit below and shared by other courts of appeals is demonstrably in error. If, as is surely the case here, an individual plaintiff could bring a separate action for punitive damages in excess of the jurisdictional minimum of $75,000, the joinder of that plaintiff's claim with others in a class action cannot somehow extinguish federal jurisdiction over the claim. But that is exactly the result of the opinion below. The *Snyder* non-aggregation principle, contrary to the view of the Ninth Circuit, in no way compels that outcome: that rule bars aggregation of jurisdictionally *insufficient* claims; it does not require *dis*aggregation of jurisdictionally *sufficient* claims.

A. The Treatment of Punitive Damages Under the Amount-In-Controversy Requirement Is an Important and Recurring Issue That Has Confused and Divided the Lower Federal Courts.

The lower courts are confused and divided over the proper treatment of punitive damages in the amount-in-controversy determination. The wide swings reflected in recent decisions addressing the subject in the Fifth and Eleventh Circuits illustrate the confusion, and also mark out the opposing positions. In *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995), the Fifth Circuit held that a class claim for punitive damages was a joint claim manifesting a common and undivided interest. That conclusion hinged on the "unique nature" of punitive damages. *Id.* at 1333. The court explained that Mississippi followed the "almost unanimous rule" concerning the purpose of punitive damages, *viz.*, that punitive damages served "to protect society by punishing and deterring wrongdoing" rather than to compensate an individ-

ual plaintiff. *Id.* The court concluded that punitive damages therefore "are fundamentally collective," and that "each plaintiff has an integrated right to the full amount of the award." *Id.* at 1333-34. As a result, the court found, "the full amount of alleged" punitive damages should "be counted against each plaintiff in determining the jurisdictional amount." *Id.* at 1333.

Just three years later, however, a separate panel of the Fifth Circuit limited *Allen* to the "peculiar nature of Mississippi law," *Ard v. Transcontinental Gas Pipe Line Corp.*, 138 F.3d 596, 602 (5th Cir. 1998), and did so notwithstanding that Louisiana law (which was at issue in *Ard*) mirrored Mississippi law in treating punitive damages as intended to further the collective interests of society rather than the particular interests of any individual plaintiff. *See, e.g., Duhon v. Conoco, Inc.*, 937 F. Supp. 1216, 1220 (W.D. La. 1996). The panel in *Ard* based its retreat from *Allen* on a 20-year-old decision involving Alabama law, a decision that, while simply containing no analysis of whether punitive damages represent a common and undivided interest, was deemed prior panel precedent on the issue. *See Ard*, 138 F.3d at 602 (relying on *Lindsey v. Alabama Tel. Co.*, 576 F.2d 593 (5th Cir. 1978)).[8] Subsequently, another panel of the Fifth Circuit appeared to suggest—again on the basis of the prior panel decision in *Lindsey*—that *Allen* was no longer binding in any circumstances, even a case involving Mississippi law. *See H&D Tire & Auto. Hardware, Inc. v. Pitney Bowes, Inc.*, 227 F.3d 326, 329-30 (5th Cir. 2000), *cert. denied*, 122 S. Ct. 214

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[8] The two-page decision in *Lindsey* finds a lack of subject matter jurisdiction based on the failure of the complaint to allege the number of persons in the class, "an allegation that would have permitted the court to ascertain what dollar amount represents the 'amount in controversy' for each member of the class." 576 F.2d at 595. Although the complaint sought both compensatory and exemplary damages, the opinion contains no analysis—and there is no indication that the court was confronted with the question—whether the request for exemplary damages implicated a common and undivided interest.

(2001). But in its later opinion denying rehearing, the panel in that case acknowledged that *Allen* remains binding in cases involving Mississippi law. *See H&D Tire & Auto. Hardware, Inc. v. Pitney Bowes, Inc.*, 250 F.3d 302, 304-05 (5th Cir. 2001).[9]

The decisions of the Eleventh Circuit follow a similarly confused course. Initially, a panel of that court concluded—largely on the basis of the reasoning in *Allen*—that punitive damages represent a common and undivided interest under Alabama law for purposes of satisfying the amount-in-controversy requirement. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1357-59 (11th Cir. 1996). A subsequent panel decision found that Florida law, like Alabama law, permits awards of punitive damages for the "collective good," and that a claim for punitive damages under Florida law thus should be attributed on an undivided basis to each member of the plaintiff class. *Cohen v. Office Depot, Inc.*, 184 F.3d 1292, 1295 (11th Cir. 1999). But the panel reversed its position on rehearing, not because it had reconsidered the merits of the question, but because *Lindsey* (which had been decided prior to the division of the Fifth Circuit and so was binding in the Eleventh Circuit) had been brought to its attention. *See Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072 (11th Cir.), *cert. denied*, 531 U.S. 957 (2001); *see also Smith v. GTE Corp.*, 236 F.3d 1292 (11th Cir. 2001) (relying on prior panel precedent rule to embrace *Lindsey*).

Thus, both the Fifth and Eleventh Circuits, when asked to address the issue squarely for the first time, determined that a class possesses a common and undivided interest in punitive damages where state law treats punitive damages as intended to serve societal interests in deterrence and retribution. And the Fifth Circuit's decision in *Allen* remains bind-

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9 The Fifth Circuit has declined to consider the issue en banc when presented with the opportunity. *See H&D*, 250 F.3d at 306-07; *Ard v. Transcontinental Gas Pipe Line Corp.*, 145 F.3d 361 (5th Cir. 1998).

ing in at least certain situations. No other decision in either court, including the 20-year old opinion in *Lindsey*, purports to reject—or even to address—the merits of the conclusion in *Allen*.

But five other courts of appeals, including the Ninth Circuit in the decision below, have reached a contrary determination on the merits of the issue. *See Crawford v. F. Hoffman-La Roche Ltd.*, 267 F.3d 760, 766 (8th Cir. 2001); *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1292-93 (10th Cir. 2001); *In re Brand Name*, 123 F.3d at 608-09; *Gilman v. BHC Sec., Inc.*, 104 F.3d 1418, 1430-31 (2d Cir. 1997). District courts outside of those circuits, meanwhile, have issued conflicting opinions. Some continue to find that claims for punitive damages represent a common and undivided interest. *See, e.g., Durang v. Servicemaster Co. Trugreen, Inc.*, 147 F. Supp. 2d 744, 751 (E.D. Mich. 2001); *Knauer v. Ohio State Life Ins. Co.*, 102 F. Supp. 2d 443, 449 (N.D. Ohio 2000). Others have sided with the opinion below. *See, e.g., Mattingly v. Hughes Elecs. Corp.*, 107 F. Supp. 2d 694, 697 (D. Md. 2000); *Lauchheimer v. Gulf Oil*, 6 F. Supp. 2d 339, 346-47 (D.N.J. 1998).

In short, most courts of appeals have now addressed the proper treatment of a class claim for punitive damages in the amount-in-controversy determination, the lower federal courts remain divided, and little would appear to be gained by awaiting further percolation of the issue. The question merits this Court's review.[10]

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10 Even assuming the Fifth and Eleventh Circuits could be said to have come into alignment with the other courts of appeals, the question presented implicates much more than a mere intra-circuit conflict. That is so for several reasons: the disagreement among those court of appeals decisions that actually address the *merits* of the issue presented; the remaining vitality of *Allen* in certain applications in the Fifth Circuit; the continued division among the district courts; the important and recurring nature of the question; and the absence of any apparent benefit from allowing its further percolation. It bears noting that this Court has granted certiorari on a number of occasions even to resolve an intra-circuit conflict where

B. The Ninth Circuit Erred in Concluding That the Class Plaintiffs' Request for Punitive Damages Should Be Apportioned Among the Class Members on a *Pro Rata* Basis.

The Court also should grant review because the view adopted by the Ninth Circuit below—and held by the other courts of appeals—is demonstrably in error, and is incompatible with this Court's decisions. The decision below finds that each plaintiff in the class possesses a "separate and distinct claim" for punitive damages in an amount below the jurisdictional minimum. But as the Fifth and Eleventh Circuit opinions addressing the merits of the question correctly reason, *see Allen*, 63 F.3d at 1332-35; *Tapscott*, 77 F.3d at 1357-59, the "collective" nature of a punitive damages award compels the conclusion that punitive damages should be attributed as an undivided whole to each member of the class.

1. The contrary conclusion of the Ninth Circuit below rests on the court's assumption that "the right to punitive damages is a right of the individual plaintiff, rather than a collective entitlement of the victim's [sic] of the defendant's misconduct." Pet. App. 17a (internal quotation marks omitted). That statement fundamentally misconceives the nature and purpose of punitive damages. In contrast to compensatory damages, which by definition vindicate individual rights, punitive damages are recognized in almost all jurisdictions to further general societal interests in punishing and deterring unlawful conduct. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) ("under the law of most States, punitive damages are imposed for purposes for retribution and deterrence"); *City of Newport v. Fact Concerts, Inc.*, 453

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the question is an important one. *See, e.g.*, *Dickinson v. Petrolum Conversion Corp.*, 338 U.S. 507, 508 (1950); *Maggio v. Zeitz*, 333 U.S. 56, 59-60 (1948); *John Hancock Mut. Life Ins. Co. v. Bartels*, 308 U.S. 180, 181 (1939).

U.S. 247, 266-67 (1981).[11] By their very nature, then, punitive damages serve "collective" rather than "individual" interests. *See Allen*, 63 F.3d at 1332-33.[12]

Punitive damages not only are collective in their nature, but they also exhibit the central characteristics of a "common and undivided" interest in their operation. As this Court has explained, for instance, a common and undivided claim exists where a plaintiff "recover[s] a portion of a common fund to be distributed among the claimants," rather than an "amount due to himself on his own separate contract." *Shields v. Thomas*, 58 U.S. (17 How.) 3, 5 (1855); *accord Davies v. Corbin*, 112 U.S. 36, 40-41 (1884) (finding "common and undivided interest" among plaintiffs seeking to "compel a tax collector to collect a single tax . . . for the purpose of distribution among all the creditors").[13] Here, because all class members share a common interest in an award of punitive damages, and because each plaintiff simply recovers a *pro rata* share of the eventual class-wide award, a class claim for punitive damages fits squarely in the category of a "common fund to be distributed among the claimants." *Shields*, 58 U.S. at 5. The amount in controversy, it follows, is the class-wide award, not the *pro rata* distribution. *See id.* at 4-5 ("matter in controversy" is "the sum due to the representatives . . . collectively, and not the particular sum to which

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[11] That is the case under the laws of New York and South Dakota, *see Sharapata v. Town of Islip*, 437 N.E.2d 1104, 1107 (N.Y. 1982); *Veeder v. Kennedy*, 589 N.W.2d 610, 622 (S.D. 1999), the particular states whose laws are alleged by Respondents to control here. *See* Pet. App. 31a.

[12] Accordingly, in some states, a portion of any award of punitive damages accrues to the state treasury. *See, e.g.*, Ga. Code § 51-12-5.1(e)(2) (75% of recovery flows to the State).

[13] The belief of the Ninth Circuit below and of other courts of appeals that it is "irrelevant" that an award of punitive damages in a class action functions as "a single pool of recovery to be allocated among multiple plaintiffs," Pet. App. 16a-17a (quoting *Gilman*, 104 F.3d at 1430), is in direct conflict with this Court's decisions.

each was entitled, when the amount due was distributed among them"); *Davies*, 112 U.S. at 41 ("value of the matter in dispute is measured by the whole amount of the tax, and not by the separate parts into which it is to be divided").

Perhaps the characteristic that most clearly confirms the existence of a "common and undivided" claim is that the defendant has no stake in the ultimate distribution of the award among the plaintiffs. *See, e.g.*, *Texas & Pac. Ry. Co. v. Gentry*, 163 U.S. 353, 363 (1896); *Handley v. Stutz*, 137 U.S. 366, 369 (1890); *Gibson*, 122 U.S. at 30; *Davies*, 112 U.S. at 41; *Shields*, 58 U.S. at 5. The "test," this Court has clarified, "is whether [the plaintiffs] claim it under one common right, the adverse party having no interest in its apportionment or distribution among them, or claim it under separate and distinct rights, each of which is contested by the adverse party." *Gibson*, 122 U.S. at 30. When confronted with a class claim for punitive damages, of course, a defendant has "no interest in" the "apportionment or distribution" of any award among the plaintiffs. *Id.* Nor do the class members claim a specific share of punitive damages as a "separate and distinct right[]" of their own, "each of which is contested" by the defendant." *Id.* The emphasis instead is on measuring the defendant's wrongdoing generally and on the size of award required to punish and deter the defendant's conduct, *see Allen*, 63 F.3d at 1333, not on circumstances unique to any individual plaintiff. *See Shield*, 58 U.S. at 5 (where plaintiff's claim is "separate and distinct," his recovery "rests altogether on its own evidence and merits," but where claim is common and undivided, "recovery . . . depend[s] upon recovery by others" in "the common fund").

Finally, an "identifying characteristic of a common and undivided interest is that if one plaintiff cannot or does not collect his share, the shares of the remaining plaintiffs are increased." *Sellers v. O'Connell*, 701 F.2d 575, 579 (6th Cir. 1983). That principle applies with full force to a class claim for punitive damages. If one member of the class opts out of

participating in the action, the overall class-wide recovery against the defendant remains constant, with the remaining plaintiffs therefore increasing their respective shares of the award. For that and the other explained reasons, class plaintiffs share a common and undivided interest in obtaining an award of punitive damages; and the relevant amount in controversy under the diversity statute is the amount of the class-wide award, not the eventual *pro rata* distribution.

2. The Ninth Circuit below, adhering to the leading court of appeals opinion on the issue, expressed concern that finding each class member to possess a common and undivided interest in punitive damages would "'eviscerate the holdings of *Snyder* and *Zahn*.'" Pet. App. 17a (quoting *Gilman*, 104 F.3d at 1431). That reasoning is entirely circular. In *Snyder* and *Zahn*, the Court *presupposed* that each class member's claim was "separate and distinct," and barred aggregation of jurisdictionally insufficient "separate and distinct" claims for purposes of establishing the amount in controversy. The issue presented here does not implicate the prohibition against aggregating "separate and distinct" claims. Instead, the question is an antecedent one: whether class claims for punitive damages are "separate and distinct" in the first place. The opinion below effectively assumes that question away.

The deeper flaw at the heart of the opinion below is the assumption that each class member's claim for punitive damages not only is "separate and distinct," but also is *for less than the jurisdictional minimum* and therefore would require aggregation with other claims to satisfy the amount-in-controversy requirement. It of course is true, as the Ninth Circuit observed below, that each "class member could bring an individual action for punitive damages." *Id.* But the critical point is that an individual class member's claim for punitive damages, if brought separately, would certainly (and substantially) exceed $75,000. After all, any one plaintiff who brought suit separately could seek the entire amount

necessary to punish and deter the defendant's unlawful conduct. *See, e.g.*, *BMW*, 517 U.S. at 568. At the very least, the individual's punitive damages recovery would approach the amount sought by the class: the measure of punitive damages turns on the reprehensibility of the defendant's conduct, including the aggregate harm caused by the defendant. *See id.* at 574, 576-77; *TXO*, 509 U.S. at 460. When plaintiffs join together to pursue punitive damages as a class, therefore, they simply pursue that same award collectively on a common and undivided basis. *See Davies*, 112 U.S. at 41 (finding common and undivided interest where "*each relator* has the right to have the *whole tax* collected for the purpose of distribution among" them) (emphasis added).

Properly understood, then, the class members here do not seek to aggregate jurisdictionally insufficient claims, as the Ninth Circuit below erroneously presumed. Instead, they seek to assert collectively claims for punitive damages that, if brought individually, would easily satisfy the amount-in-controversy requirement. Those circumstances do not implicate the long-settled purpose of the non-aggregation rule—to ensure that joinder does not create federal jurisdiction over jurisdictionally insufficient claims. *See, e.g.*, *Gibson*, 122 U.S. at 30. In fact, the effect of the opinion below is to hold that joinder somehow *destroys* federal jurisdiction over jurisdictionally *sufficient* claims. Far from being necessary to avoid "eviscerat[ing] the holdings of *Snyder* and *Zahn*," Pet. App. 17a, then, the decision below stands the non-aggregation principle on its head. This Court should grant review to correct the erroneous rule in several courts of appeals that class claims for punitive damages fail to involve a "common and undivided interest," a rule at odds with this Court's decisions and with the premise of the non-aggregation principle.[14]

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[14] Both questions presented in this case are related to the questions presented in a petition currently pending in a separate case, *DaimlerChrysler Corp. v. Gibson*, No. 01-688 (petition filed Nov. 9, 2001). One of the questions in that case is substantially the same as the punitive damages question presented here. The other is a question the Court attempted unsuccessfully to resolve two years ago: whether 28 U.S.C. § 1367 supersedes the requirement of *Zahn* that each member of a plaintiff class in a diversity case must individually satisfy section 1332's amount-in-controversy requirement. If the Court decides to grant the petition in *DaimlerChrysler* as to one or both of the questions there presented, the relationship between the issues in that case and those presented here would provide additional reason to grant this petition.

If the Court decides to grant the petition in *DaimlerChrysler* with respect at least to the punitive damages question, then it should grant review of at least that part of this petition and consider the two cases together. Alternatively, the Court should hold this petition pending the disposition of *DaimlerChrysler*.

If the Court grants review of the 1367/*Zahn* issue in *DaimlerChrysler*, the questions presented here will be critical whether the Court holds that *Zahn* still controls or that section 1367 supersedes *Zahn*. If the Court holds that *Zahn* still controls, then the questions presented in this case will continue to be central to evaluating the amount in controversy in claims for injunctive relief and for punitive damages. Alternatively, if the Court holds that section 1367 supersedes *Zahn*, either of the jurisdictional theories advocated here will be sufficient to establish jurisdiction over the claim of any single class member: the cost of complying with an injunction in favor of any one plaintiff would exceed $75,000, and the punitive damages claim would be worth far more than $75,000 if brought by only one plaintiff. With the amount-in-controversy requirement thus met for a single plaintiff, the rest of the class could be brought along under section 1367's supplemental jurisdiction without regard to the value of their claims. Accordingly, the Court should review the questions presented here in tandem with the 1367/*Zahn* issue in *DaimlerChrysler* if the Court grants review of that issue, or should at least hold this petition pending resolution of the 1367/*Zahn* issue.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should hold the petition pending its disposition of the petition, and its possible decision on the merits, in *DaimlerChrysler v. Gibson*, No. 01-688.

Respectfully submitted,

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December 2001

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: FORD MOTOR COMPANY/CITIBANK (SOUTH DAKOTA), N.A., Cardholder Rebate Program Litigation

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JOHN B. MCCAULEY *et al.*,

Plaintiffs-Appellees,

v.

FORD MOTOR COMPANY, *et al.*,

Defendants.

Nos. 99-36115, 99-36206
(Consolidated)
[Filed Sept. 6, 2001]

[Reported at 264 F.3d 952]

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Appeal from the Decision of the United States District Court for the Western District of Washington; William L. Dwyer, District Judge, Presiding. D.C. Nos. MD-98-01199-WLD, CV-97-01293-WLD, CV-98-00151-WLD, CV-98-00152- WLD, CV-98-00153-WLD, CV-98-00226-WLD.

Before: BROWNING, WALLACE, and T.G. NELSON, Circuit Judges.

WALLACE, Circuit Judge:

Ford Motor Company (Ford) and Citibank (South Dakota), N.A. (Citibank) appeal from the district court's order dismissing the consolidated complaint of several underlying state court lawsuits under 28 U.S.C. § 1332 for lack of subject matter jurisdiction, and remanding these state suits to the courts from which they were removed. We must decide two questions. First, whether the minimum amount in controversy required to maintain a diversity suit in federal court ($75,000) is present in the consolidated action. We have jurisdiction under 28 U.S.C. § 1291 to review the district court's order dismissing the consolidated complaint for lack of subject matter jurisdiction, and we affirm. Second, we must determine whether we have jurisdiction to entertain a challenge to the district court's order remanding the original actions to the state court from which they came. We do not.

I

In early 1993, Ford and Citibank issued a co-branded Ford/Citibank credit card that offered cardholders the opportunity to save on the purchase or lease of a new Ford vehicle through a usage-incentive program. Under the program cardholders earned a 5% rebate on each purchase made using the Ford/Citibank credit card and could accrue a maximum of $700 in rebates per year (representing $14,000 in purchases) over a five-year period, for a maximum possible rebate of $3,500, redeemable toward the purchase or lease of certain Ford vehicles. On December 31, 1997--less than five years after the program's inception--Ford and Citibank terminated the rebate accrual feature of the Ford/Citibank credit card.

Six state actions were filed in Washington, Oregon, California, Illinois, Alabama, and New York, alleging generally that Ford and Citibank misrepresented or withheld information about the nature and duration of the rebate program and wrongfully discontinued it. Ford and Citibank removed each case to federal district court on the basis of diversity jurisdiction, then petitioned the Judicial Panel on Multidistrict Litigation (Panel) to consolidate **[956]** and transfer the cases to a single district court for pre-trial proceedings, pursuant to 28 U.S.C. § 1407. "Under 28 U.S.C. § 1407, [the Panel] is authorized to transfer civil actions pending in more than one district involving one or more common questions of fact to any district court for coordinated or consolidated pretrial proceedings upon its determination that transfer 'will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions.'" Fed. Judicial Ctr., Moore's Federal Practice Manual for Complex Civil Litigation § 31.13 (3d ed.2000).

On January 8, 1998, and June 12, 1998, the Panel transferred the six removed actions to the Western District of Washington "for coordinated or consolidated pretrial proceedings." The transferee district court consolidated the cases on July 16, 1998, and a consolidated complaint was

filed on August 5, 1998. Purporting to sue on behalf of a nationwide class of six million Ford/Citibank cardholders, the consolidated plaintiffs alleged state law causes of action for breach of contract, unjust enrichment and consumer fraud, and plead diversity jurisdiction under 28 U.S.C. § 1332(a). The consolidated plaintiffs sought relief in the form of specific performance, disgorgement, and compensatory and punitive damages.

After transfer and consolidation, Ford and Citibank moved to dismiss the consolidated complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), and the district court denied the motion. The consolidated plaintiffs moved for class certification. However, after discovery was completed and the issue had been fully briefed by the parties, the district court deferred judgment on class certification and instead issued an order to show cause why "the consolidated action ... should not be dismissed for lack of jurisdiction, and why [the six underlying actions] should not be ... remanded to state court." Though neither party had challenged the district court's jurisdiction at any point in the proceedings, the district judge properly raised sua sponte the issue of whether the consolidated complaint alleged more than $75,000 in controversy under 28 U.S.C. § 1332(a).

Ford and Citibank filed a memorandum in support of jurisdiction, raising three reasons why the amount in controversy requirement was met: (1) the cost of compliance with the request for injunctive relief would exceed $75,000; (2) the consolidated plaintiffs have a common and undivided interest in their compensatory damages claim, which exceeds $75,000; and (3) the consolidated plaintiffs have a common and undivided interest in their punitive damages claim, which exceeds $75,000.

In an order dated October 29, 1999, the district court held that it "lack[ed] subject matter jurisdiction over the consolidated complaint and the six removed cases." The district court dismissed the consolidated complaint for lack of jurisdiction and remanded the underlying actions to the several state courts of origin.

Pursuant to the Panel's rules of procedure, *see* R.P.J.P.M.L. 7.6(a), the district court sent a copy of the order to the Panel on November 8, 1999. In the attached letter, the district judge explained:

> [T]his order dismisses, for lack of subject matter jurisdiction, a consolidated complaint filed by the plaintiffs in this court. The dismissal of the consolidated complaint necessitated a disposition of the six original actions filed in state court, removed to federal court on the basis of diversity of citizenship, and transferred by the Panel to the [Western District of Washington] for coordinated or consolidated pretrial proceedings. For lack of subject matter **[957]** jurisdiction, the order remands those cases to state court.

Ford and Citibank timely appealed, challenging both the district court's dismissal of the consolidated complaint and its remand of the underlying actions.

II

We must first consider whether we have jurisdiction to review the district court's order which states "[t]he consolidated complaint is hereby dismissed for lack of jurisdiction." Because the district court's dismissed the "complaint" rather than the "action," the question arises whether the order is final and appealable. "Ordinarily an order dismissing a complaint but not dismissing the action is not appealable under section 1291 unless circumstances make it clear that the court concluded that the action could not be saved by any amendment of the complaint." *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1171 n. 1 (9th Cir. 1984). However, "[i]f it appears that the district court intended the dismissal to dispose of the action, it may be considered final and appealable." *Id.* (emphasis added).

Here, the record clearly indicates that the district court intended to dispose of the consolidated action. First, the dismissal did not grant leave to amend. *See id.*; *see also Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1514 (9th Cir. 1987) ("Failure to allow leave to amend supports an inference that the district court intended to make the order final."). We are also aided by the district court's contemporaneous letter to the Panel which demonstrates a clear intention to terminate the case. The district court expressly sent the letter "[i]n compliance with R.P.J.P.M.L. 7.6(a)," which provides that "[a]ctions terminated in the transferee district court by valid judgment ... shall not be remanded by the Panel and shall be dismissed by the transferee district court. The clerk of the transferee court shall send a copy of the order terminating the action to the Clerk of the Panel...." (Emphasis added).

Although a specific dismissal of the action would have been preferable, we conclude in this case that we have jurisdiction to review the dismissal order under 28 U.S.C. § 291.

III

We review de novo a district court's dismissal for lack of subject matter jurisdiction. *Brady v. United States*, 211 F.3d 499, 502 (9th Cir. 2000). The party asserting federal jurisdiction bears the burden of proving the case is properly in federal court. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936). Here, diverse citizenship is uncontested. Thus, the sole jurisdictional question is whether the minimum amount in controversy required to maintain a diversity suit in federal court is present. As the parties asserting diversity jurisdiction, Ford and Citibank bear the burden of establishing by a preponderance of the evidence that the amount in controversy exceeds $75,000. *See Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996).

On appeal, Ford and Citibank do not contend that any plaintiff has an individual damages claim exceeding $75,000.

Nor do they contend that the individual plaintiffs' damages claims may be aggregated to satisfy the jurisdictional amount requirement. It is undisputed on appeal that the individual plaintiffs do not have a common and undivided interest in a claim for damages.

However, compensatory damages are not the only form of relief sought. The consolidated plaintiffs also seek injunctive relief, disgorgement, and punitive damages. **[958]** Ford and Citibank contend that each of these claims provides the requisite jurisdictional amount.

A.

Ford and Citibank first argue that their cost of compliance with the request for injunctive relief carries this case over the jurisdictional amount threshold. Relying upon our decision in *Sanchez*, 102 F.3d at 405, they contend that the amount in controversy requirement is satisfied if either party can gain or lose the jurisdictional amount (the so-called "either viewpoint" rule). Here, the consolidated plaintiffs seek specific performance of the rebate program, and Ford and Citibank submit that it will cost them more than $75,000 to reinstate and administer the rebate accrual feature of the Ford/Citibank credit card.

Under the "either viewpoint" rule, the test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce. *See Ridder Bros. Inc. v. Blethen*, 142 F.2d 395, 399 (9th Cir. 1944) (holding that for purposes of calculating amount in controversy, "[t]he value of the thing sought to be accomplished by the action may relate to either or any party to the action") (internal quotation omitted). In other words, where the value of a plaintiff's potential recovery (in this case, a maximum of $3,500) is below the jurisdictional amount, but the potential cost to the defendant of complying with the injunction exceeds that amount, it is the latter that represents the amount in controversy for jurisdictional purposes.

In *Sanchez*, we observed en banc that "*Ridder* ... rejected the 'plaintiff-viewpoint' rule, which states that courts attempting to determine the value of a claim for purposes of the amount in controversy requirement should look only to the benefit to the plaintiff, rather than to the potential loss to the defendant." 102 F.3d at 405 n. 6. *Ridder* stated that in suits involving equitable relief, "if the value of the thing to be accomplished [is] equal to the dollar minimum of the jurisdictional amount requirement to anyone concerned in the action, then jurisdiction [is] satisfied." 142 F.2d at 398. We did not apply *Ridder* in *Sanchez*, however, because the party with the burden of proof failed to provide any evidence to determine the extent of the loss that it would incur by an injunction.

But *Ridder* and *Sanchez* are single-plaintiff cases. Here, there are multiple plaintiffs seeking to sue on behalf of a putative class of six million individuals. We have specifically declined to extend the "either viewpoint rule" to class action suits. *See Snow v. Ford Motor Co.*, 561 F.2d 787, 790 (9th Cir. 1977). This limitation on the rule should apply regardless of whether the requested class has been certified. Indeed, logic would dictate that it should apply to all multiparty complaints. While "[i]t may seem paradoxical to [decline jurisdiction] in the multiplaintiff setting," where the potential loss to defendants typically is well beyond the jurisdictional amount threshold, "it is implicit in the rule that forbids aggregation of class members' separate claims that it will sometimes be more difficult for a [party asserting federal jurisdiction] to establish the minimum amount of controversy in a multiplaintiff case than in a much smaller single-plaintiff case." *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 609 (7th Cir. 1997).

In *Snow*, we acknowledged the inherent conflict between the "either viewpoint" rule and the non-aggregation rule when calculating the amount in controversy in class action suits seeking equitable relief, and determined that the former

must [959] yield. *Snow*, 561 F.2d at 788-91. In light of the Supreme Court's decisions in *Snyder v. Harris*, 394 U.S. 332, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969) and *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S. Ct. 505, 38 L. Ed. 2d 511 (1973), prohibiting aggregation, we declined to apply *Ridder* in a class action suit seeking damages and injunctive relief, stating that "[in class actions,] the threshold question is aggregation, and it must be resolved affirmatively before total detriment [to the defendant] can be considered." *Id.* at 790. Otherwise, the principle of *Snyder* and *Zahn* would be subverted, i.e., plaintiffs with minimal damages could dodge the non- aggregation rule by praying for an injunction. *See id.* at 791. We recognized that " '[t]otal detriment' is basically the same thing as aggregation," and held that "where the equitable relief sought is but a means through which the individual claims may be satisfied, the ban on aggregation applies with equal force to the equitable as well as the monetary relief." *Id.* at 790 (internal quotation omitted).

Thus, under *Snow*, "the proper focus [in multiple plaintiff cases] is not influenced by the type of relief requested, but rather ... depend[s] upon the nature and value of the right asserted." *Id.* Put differently, "[w]hatever the form of relief sought, each plaintiff's claim must be held separate from each other plaintiff's claim from both the plaintiff's and the defendant's standpoint. The defendant in such a case is deemed to face multiple claims for injunctive relief, each of which must be separately evaluated." *Brand Name*, 123 F.3d at 610, citing *Snow*, 561 F.2d at 790. The question then becomes whether each plaintiff is asserting an individual right or, rather, together the plaintiffs "unite to enforce a single title or right in which they have a common and undivided interest." *Snyder*, 394 U.S. at 335, 89 S. Ct. 1053. If it is the latter, we may then look to the "either viewpoint" rule to determine jurisdiction. If it is the former, the test is the cost to the defendants of an injunction running in favor of one plaintiff. *See Brand Name*, 123 F.3d at 610.

In an effort to carry this case across the amount in controversy threshold in the face of *Snow*, Ford and Citibank first contend that the consolidated plaintiffs have a "common and undivided interest" in the injunctive relief they seek, and compliance will cost substantially more than $75,000. Second, they aver that it will cost them more than $75,000 to reinstate and administer the rebate accrual program whether it is done for one plaintiff or six million. Thus, they allege that the "either viewpoint" rule may be applied in this case without running afoul of the non-aggregation principle of *Snyder* and *Zahn*.

1.

Turning to the first point, we are helped to understand the meaning of "common and undivided interest" by *Gilman v. BHC Sec., Inc.*, 104 F.3d 1418, 1423 (2d Cir. 1997), where the court explained that "the 'paradigm cases' allowing aggregation of claims 'are those which involve a single indivisible res, such as an estate, a piece of property (the classic example), or an insurance policy. These are matters that cannot be adjudicated without implicating the rights of everyone involved with the res.'" *Id.* (citation omitted). That does not fit the case before us in which the claims arising out of the termination of the rebate program do not implicate a "single indivisible res," and could be adjudicated on an individual basis because the consolidated plaintiffs (and putative class members) have no common and undivided interest in accruing rebates under the program. Each plaintiff charged purchases and accrued rebates individually, not as a group. **[960]** Thus, prior to litigation, they shared no common interest. As Ford and Citibank correctly stated in their memorandum opposing class certification, "[t]his case, after all, does not involve a common fund or a joint interest among cardholders. Instead, it involves a collection of individual claims based on individual patterns of consumer purchasing decisions." They concluded that "[b]ecause the [putative] class members in this case do not in any sense possess joint ownership of, or an undivided interest in a common res, their claims ... are separate and distinct." *Id.* at 1424.

In spite of this earlier concession, Ford and Citibank now urge us to adopt *Loizon v. SMH Societe Suisse de Microelectronics*, 950 F. Supp. 250 (N.D. Ill. 1996), and hold that the putative class members have a "common and undivided" interest in the "opportunity to accrue rebates" because the injunctive relief requested--reinstating the rebate accrual program-- necessarily would benefit the putative class as a whole. There, plaintiffs sought injunctive relief, requiring the defendants to notify all putative class members of the potential dangers of wearing a line of watches manufactured by the defendants that contained a radioactive isotope. *Id.* at 252-53. The court found that the injunctive relief requested--corrective advertising--would benefit the class as a whole and, thus, held that the putative class members had a "common and undivided interest" because "only the class, and not individual class members, could request the injunctive relief." *Id.* at 254.

We are foreclosed from adopting *Loizon* because our decision in *Snow* tells us that "the proper focus ... is not ... the type of relief requested, but rather ... the nature and value of the right asserted." 561 F.2d at 790. Here, the consolidated plaintiffs assert the right to accrue rebates under the canceled program. That right is distinct to each plaintiff, is based on his or her individual contractual relationship with Ford and Citibank, and is worth no more than $3,500. "The fact that the plaintiff[s] seek [specific performance] does not through shear [sic] alchemy transform a cause of action which will provide marginal benefits ... into a claim that meets the ... amount in controversy requirement." *Smiley v. Citibank*, 863 F. Supp. 1156, 1164 (C.D. Cal. 1993), relying on *Snow*, 561 F.2d at 791. As we held earlier, to hold otherwise would permit plaintiffs to circumvent the non-aggregation rule simply by seeking equitable relief.

Therefore, we hold that the consolidated plaintiffs in this case have not "unite[d] to enforce a single title or right in which they have a common and undivided interest." *Snyder*, 394 U.S. at 335, 89 S. Ct. 1053. "[T]he equitable relief sought [in this case] is but a means through which the individual claims may be satisfied," *Snow*, 561 F.2d at 790, and no plaintiff has an individual claim worth more than $75,000.

2.

The second effort to overcome *Snow* is the argument that because the cost of an injunction running in favor of one plaintiff would exceed $75,000, aggregating the cost of compliance is unnecessary to satisfy the amount in controversy requirement. In other words, while the monetary benefit to an individual plaintiff of reinstating the rebate accrual program would be relatively insubstantial, the fixed costs to Ford and Citibank of reinstating and maintaining the program would be the same whether it is done for one plaintiff or for six million. Thus, Ford and Citibank assert that because the non-aggregation rule would not be violated if their fixed administrative costs were used to establish the amount in controversy requirement, we may look to **[961]** the "either viewpoint" rule to establish the jurisdictional amount.

At first blush, this argument appears consistent with *Snow*. However, it is fundamentally violative of the principle underlying the jurisdictional amount requirement--to keep small diversity suits out of federal court. If the argument were accepted, and the administrative costs of complying with an injunction were permitted to count as the amount in controversy, "then every case, however trivial, against a large company would cross the threshold." *Brand Name*, 123 F.3d at 610. "It would be an invitation to file state-law nuisance suits in federal court." *Id.* Therefore, we hold that the amount in controversy requirement cannot be satisfied by showing that the fixed administrative costs of compliance exceed $75,000.

B.

Next, the defendants contend that the consolidated plaintiffs' unjust enrichment claim, which seeks disgorgement of "billions of dollars" of "ill-gotten benefit[s]," satisfies the amount in controversy requirement. Relying upon *Aetna U.S. Healthcare, Inc. v. Hoechst Aktiengesellschaft*, 48 F. Supp. 2d 37 (D.D.C. 1999), Ford and Citibank argue that "the plaintiff class has a collective right to a disgorgement in the amount of the unjust enrichment." *Id.* at 41. Several district courts have held that a claim for disgorgement falls within the "common and undivided interest" exception to the non-aggregation rule. *See, e.g., In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 720 (D. Md. 2001); *In re Cardizem CD Antitrust Litig.*, 90 F. Supp. 2d 819, 828-29 (E.D. Mich. 1999); *Aetna*, 48 F. Supp. 2d at 41; *but see, Arnold v. General Motors Corp.*, 1998 WL 827726 at *2 (N.D. Cal. Nov. 18, 1998), relying on *Snow*, 561 F.2d at 790. These cases "rest their holdings upon the premise that disgorgement is a form of relief separate from, and independent of, individual damage recovery and that disgorgement 'would inure to the benefit of the class rather than vindicate any alleged violations of individual rights.'" *Microsoft*, 127 F. Supp. 2d at 720, quoting *Aetna*, 48 F. Supp. 2d at 41.

The Second Circuit rejected this argument, emphasizing that "what controls is the nature of the right asserted, not whether successful vindication of the right will lead to a single pool of money that will be allocated among the plaintiffs." *Gilman*, 104 F.3d at 1427. The court held that, despite its cloak of collectiveness, the plaintiffs' disgorgement claim was not aggregable for jurisdictional purposes because "[t]he claim remains one on behalf of separate individuals for the damage suffered by each due to the alleged conduct of defendant." *Id.* (internal quotation omitted). That is, simply because the plaintiffs request disgorgement of "all benefits" does not establish that the right which they seek to enforce is collective.

We agree with the Second Circuit. We point out that this position is consistent with our decision in *Snow*, where, as explained previously, we held that the proper focus in determining whether class action claims may be aggregated is not the type of relief requested, but rather the nature and value of the right asserted. 561 F.2d at 790. In the disgorgement context, the germane question becomes whether "the plaintiffs' claims are consistent with a demand for damages based on their individual transactions with [the defendants]." *Gilman*, 104 F.3d at 1425 n. 8.

Applying this to the case before us is not difficult. The "ill-gotten benefit" alleged in the consolidated plaintiffs' unjust enrichment claim is comprised of: (1) the "profit[s] from ... interest charges and **[962]** intercharge fees [Ford and Citibank] collected as a result of the billions of dollars Class members, including plaintiffs, charged on their Ford Citibank Cards," which they would not have used but for the canceled rebate accrual feature; and (2) the "expiration of billions of dollars in rebates earned by plaintiffs and class members." The complaint thus demonstrates that the consolidated plaintiffs have no common and undivided interest in the disgorgement of the alleged ill-gotten benefits. They charged purchases and accrued rebates individually, not as a group. Thus, prior to litigation, they shared no common interest. Each cardholder could have brought a separate and individual action to recover the alleged benefits. Thus, "[t]he claim remains one on behalf of separate individuals for the damage suffered by each due to the alleged conduct of the defendant[s]." *Id.* at 1427.

In seeking disgorgement, the consolidated plaintiffs do not unite to enforce a "single title or right in which they have a common and undivided interest." *Snyder*, 394 U.S. at 335, 89 S. Ct. 1053. Therefore, the total disgorgement amount requested cannot be used to satisfy the jurisdictional amount requirement.

C.

Finally, Ford and Citibank argue that the claim for punitive damages satisfies the jurisdictional amount requirement because the punitive damages sought in this case are a single collective right in which plaintiffs have a common and undivided interest. In support of their argument, they rely on the Fifth and Eleventh Circuit's decisions in *Allen v. R & H Oil and Gas Co.*, 63 F.3d 1326 (5th Cir. 1995), and *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353 (11th Cir. 1996), and our decision in *In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982).

First, *Allen* and *Tapscott*, which held that punitive damages may be aggregated in class suits, have been disavowed by their respective circuits. *See H&D Tire and Auto. Hardware, Inc. v. Pitney Bowes, Inc.*, 227 F.3d 326, 329-30 (5th Cir. 2000) (holding that *Allen* is not valid precedent because it conflicts with an earlier and, thus, controlling, pre-Fifth Circuit split opinion barring aggregation of punitive damages to establish diversity jurisdiction); *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1073-77 (11th Cir. 2000) (holding that *Tapscott* is not valid precedent for same reason).

Second, the defendants contend that in *Dalkon Shield*, we "implicitly [held] that punitive damages may be aggregated for [jurisdictional] purpose[s]." They are wrong. In *Dalkon Shield*, we vacated the district court's class certification order but were silent on the issue of subject matter jurisdiction. The district court in *Dalkon Shield* had held that it had jurisdiction because, "[i]n the face of plaintiffs' allegations concerning punitive damages, [the] court cannot say to a legal certainty that the total award will not yield more than [the jurisdictional amount] to each successful claimant." *In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 910 (N.D. Cal. 1981). The district court went on to state that "[t]he claims before this court for an award of punitive damages also satisfy the jurisdictional amount requirement ... [because] the plaintiffs ... have a

common and undivided interest in the recovery of punitive damages against the corporate defendant." *Id.* at 910-911. Because the district court's jurisdictional determination was disjunctive, our silence on the issue cannot be read as an implicit endorsement of the latter ground.

[963] Therefore, because we have not squarely addressed the issue, the question of whether punitive damages may be attributed *in toto* to each member of a putative class is a matter of first impression in this circuit. After the Fifth and Eleventh Circuit's retractions of *Allen* and Tapscott, all of the circuits that have considered the question now have answered in the negative. *See Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1292 (10th Cir. 2001); *Smith v. GTE Corp.*, 236 F.3d 1292, 1301 (11th Cir. 2001); *Pitney Bowes, Inc.*, 227 F.3d 326, 329-30 (5th Cir. 2000); *Brand Name*, 123 F.3d at 608-09 (7th Cir.); *Gilman*, 104 F.3d at 1431 (2nd Cir.). This view squares with our analogous jurisdictional amount decisions. *See Snow*, 561 F.2d at 790 (holding that the equitable relief sought by a class may not be aggregated where each class member's claim is separate and distinct); *Goldberg v. CPC International, Inc.*, 678 F.2d 1365, 1367 (9th Cir. 1982) (holding that attorneys' fees sought by class members cannot be aggregated for purposes of determining the amount in controversy).

Our analysis is substantially similar to our discussion of the disgorgement remedy, and the focus remains, as it must in light of *Snyder* and *Zahn*, on whether the consolidated plaintiffs and putative class members unite to assert a single title or right. Though the consolidated plaintiffs and putative class members in this case

> may indeed share an interest in receiving [punitive] damages ... that has nothing to do with whether--prior to litigation--they jointly held a single title or right in which each possessed a common and undivided interest. It is irrelevant whether successful vindication of claims would create a single pool of

> recovery to be allocated among multiple plaintiffs; a common interest in a pool of funds is not the type of interest that permits aggregation of claims under the "common fund" doctrine.

Gilman, 104 F.3d at 1430. Or, as the Seventh Circuit stated in *Brand Name*, "the right to punitive damages is a right of the individual plaintiff, rather than a collective entitlement of the victim's of the defendant's misconduct" because "[a] plaintiff's award of punitive damages is not limited by awards made to previous plaintiffs complaining of the same act of the defendant." 123 F.3d at 608-09; *see also*, *Allen*, 63 F.3d at 1334. Each consolidated plaintiff and class member could bring an individual action for punitive damages and have his or her rights adjudicated without implicating the rights of every other person claiming such damages. *See Gilman*, 104 F.3d at 1430. "Claims for punitive damages, like claims for compensatory damages, are brought together in a class action for the convenience of the plaintiffs," not because the plaintiffs share a common and undivided interest in a single, indivisible res. *See id.*

We join our sister circuits and hold that "punitive damages asserted on behalf of a [putative] class may not be aggregated for jurisdictional purposes where, as here, the underlying cause of action asserted on behalf of the class is *not* based upon a title or right in which the plaintiffs share, and as to which they claim, a common interest." *Gilman*, 104 F.3d at 1431. "To hold otherwise ... would eviscerate the holdings of *Snyder* and *Zahn* and would run counter to the strict construction of the amount-in-controversy requirement those cases mandate." *Id.*

For the foregoing reasons, we hold that Ford and Citibank have not met their burden of establishing that the jurisdictional amount in this case exceeds $75,000. The district court properly dismissed the consolidated **[964]** complaint for lack of subject matter jurisdiction.

IV

Last, Ford and Citibank contend that the district court erred when, after dismissing the consolidated complaint for lack of jurisdiction, it remanded the six underlying actions to their respective state courts of origin. They argue that the district court's dismissal of the consolidated complaint simultaneously terminated the underlying actions because the consolidated complaint superseded all previous complaints filed by the plaintiffs, rendering them "non-existent." Thus, the defendants assert that dismissing the consolidated complaint left the district court with nothing to remand and no authority to "revive" the underlying actions.

We first test our own jurisdiction: is the district court's remand order subject to our review? 28 U.S.C. § 1447(d) generally forbids appellate review of remand orders: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." However, the Supreme Court has interpreted section 1447(d) to prohibit "only remand orders issued under § 1447(c)." *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 346, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976) (abrogated on other grounds by *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996)). That is, remand orders based upon any defect in removal or lack of subject matter jurisdiction are immune from review. *See* 28 U.S.C. § 1447(c); *Thermtron*, 423 U.S. at 351, 96 S. Ct. 584.

Here, the district court specifically held that it "lack[ed] subject matter jurisdiction over the consolidated complaint *and* the six removed cases" because Ford and Citibank failed to satisfy the jurisdictional amount requirement of 28 U.S.C. § 1332(a). (Emphasis added). Therefore, it dismissed the consolidated complaint and, pursuant to section 1447, remanded the six underlying actions to state court. Thus, it would appear clear that we are prohibited from reviewing the district court's remand order under section 1447(d).

However, Ford and Citibank argue that the remand order is not immune from our review because the district court did not, in fact, base its decision to remand on a lack of jurisdiction. *See Thermtron*, 423 U.S. at 350, 96 S. Ct. 584 (holding that the prohibition against review does not extend to remand orders entered on grounds not provided by section 1447). They contend that the district court's letter to the Panel "made clear that the remand component of its order was occasioned by docket-management considerations rather than by any jurisdictional finding." This is simply wrong. The letter expressly stated that "for *lack of subject matter jurisdiction*, the order remands [the underlying] cases to state court." (Emphasis added) There is not a word about docket management, or any other ground not provided by section 1447. Thus, the Thermtron exception does not apply.

Next, Ford and Citibank argue that they do not appeal the propriety of the district court's jurisdictional decision with respect to the underlying cases--which section 1447(d) would prohibit--but rather, they dispute the district court's *power* to render the decision in the first place. They contend that because "[t]he consolidated complaint superseded each of the original complaints, effectively establishing a single lawsuit," dismissal of the consolidated complaint terminated the underlying actions too. Thus, they argue, the district court erred by remanding "non-existent" actions to state court.

[965] Because this argument takes aim at the district court's *authority* to issue the remand order, we have jurisdiction to address the narrow question whether the consolidated federal complaint superseded the underlying state actions in such a way that they were in effect non-existent. *See N. Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034, 1038 (9th Cir. 1995) ("[U]nder Thermtron, we have jurisdiction to decide whether a district court has the power to do what it did in issuing a remand order,

although we cannot examine whether a particular exercise of power was proper.") (internal quotations omitted).

Ford and Citibank begin their argument with the premise that a consolidated complaint is "akin to an amended complaint," which "supersedes the original, the latter thereafter being treated as non-existent." *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). They thus contend that the consolidated complaint amended the original state complaints, rendering them "non- existent." However, they provide no authority for this proposition. The cases on which they rely merely stand for the unremarkable propositions that: (1) an amended complaint supersedes an original and (2) in a consolidated action, a consolidated complaint is the operative pleading and supersedes all previously filed complaints. No authority supports the contention that a consolidated complaint touches or disturbs underlying state claims.

Nor is there anything cited to us in the record that demonstrates the district court meant for the complaints in the remand cases to disappear. On the contrary, the plaintiffs "consolidate" their efforts into one document which becomes the operative pleading. No court order did anything more than this. Once that umbrella complaint was dismissed, it left the underlying state removed complaints intact. Therefore, the district court did not exceed its authority in remanding the underlying removed actions to state court and, pursuant to section 1447(d), we lack jurisdiction to review its decision.

AFFIRMED IN PART AND DISMISSED IN PART

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: FORD MOTOR COMPANY/CITIBANK (SOUTH DAKOTA), N.A., Cardholder Rebate Program Litigation

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JOHN B. MCCAULEY *et al.*,
Plaintiffs-Appellees,

v.

FORD MOTOR COMPANY, *et al.*,
Defendants.

Nos. 99-36115, 99-36206
(Consolidated)

[Filed Oct. 22, 2001]

Before: BROWNING, WALLACE, and T.G. NELSON, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judge T.G. Nelson has voted to deny the petition for rehearing en banc, and Judge Browning and Wallace so recommend.

The Petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE FORD MOTOR COMPANY/CITIBANK (SOUTH DAKOTA),
N.A. CARDHOLDER REBATE PROGRAM LITIGATION

No. MDL-1199
This Document Relates To All Cases
[Filed October 29, 1999]

**ORDER OF DISMISSAL
AND REMAND TO STATE COURT**

I. INTRODUCTION

Six lawsuits were filed against defendants Ford Motor Company and Citibank (South Dakota), N.A., in courts of different states. Each complaint asserted solely state claims. The plaintiffs alleged that the defendants misrepresented or withheld information about the nature and duration of the Ford/Citibank cardholder rebate program and then wrongfully discontinued that program. The defendants removed each case to federal court on the basis of diversity jurisdiction. Between January 8, 1998, and June 12, 1998, the Judicial Panel on Multidistrict Litigation transferred the six cases to this court for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. On August 5, 1998, plaintiffs filed a consolidated complaint meant to supersede

the six original actions and purporting to sue on behalf of a nationwide class that would comprise an **[2]** estimated six million persons. The consolidated complaint asserts three claims, all based on state law (breach of contract, violation of state consumer protection statutes, and unjust enrichment), and pleads jurisdiction solely based on diversity of citizenship.

At the parties' mutual request, class certification and other proceedings were deferred for a period of time. Plaintiffs then moved for class certification and a hearing on the motion was held on July 29, 1999. During the hearing, plaintiffs requested additional discovery and supplemental briefing on the Rule 23 issues; the request was granted and the class action motion was renoted for October 7, 1999.

No motion for remand or challenge to the existence of diversity jurisdiction has been filed.[1] The defendants' supplemental brief opposing class certification, however, raised certain arguments that cast doubt on the existence of jurisdiction.[2] Recognizing that the court's duty is to inquire sua sponte into jurisdiction when appropriate, *see Rincon Band of Mission Indians v. County of San Diego*, 495 F.2d 1, 8 (9th Cir. 1974) citing *California v. LaRue*, 409 U.S. 109, 112-13 n.3 (1972)), the court issued a show cause order on October 14, 1999. In response, the plaintiffs make no arguments for diversity jurisdiction even though they pleaded it in their

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1 A motion to remand one of the six cases, *Merrick v. Ford Motor Co.*, No. C98-153WD, was withdrawn before a decision was made.

2 *See* Defs.' Suppl. Mem. Opp'n Class Cert. (Dkt. # 113) at 14 ("This case, after all, does not involve a common fund or a joint interest among cardholders. Instead, it involves a collection of individual claims based on individual patterns of consumer purchasing decisions. The Ninth Circuit has made clear that aggregated damages may not be awarded in this type of case. . ."). *See also id.* at 4 ("As to both proposed classes, plaintiffs suggest a variety of aggregated damage-calculation methodologies, while ignoring the fact that claimant-specific jury trials are needed to determine which (if any) cardholders were 'damaged' in the first place.").

consolidated complaint. "[T]he trend," they say, "suggests jurisdiction is questionable." Pls.' Resp. Order Show Cause ((Dkt. # 117) at 3. Defendants, on the other hand, argue that the requirements for diversity jurisdiction are met.

[3] II. ANALYSIS

A. Legal Standard

A defendant may remove a case from state to federal court pursuant to 28 U.S.C. §§ 1441 and 1446. Removal jurisdiction is "strictly construed and federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996) (quoting *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-9 (1941) and *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)). Should the district court determine that it lacks subject matter jurisdiction over the removed case, the district court must remand it to state court. 28 U.S.C. § 1447. A transferee court conducting pretrial proceedings under 28 U.S.C. § 1407 has the power to enter an order to remand. *See* R.P.J.P.M.L. 7.6(a). *See also In re Ivy*, 901 F.2d (2d Cir. 1990). Where, as here, jurisdiction is asserted based on diversity of citizenship, there must be complete diversity between the class representatives and the defendants, and the "matter in controversy" must exceed $75,000. 28 U.S.C. § 1332(a). Here the parties are of diverse citizenship, and the question is whether the consolidated complaint places more than $75,000 in controversy. The defendants, as the parties asserting federal jurisdiction, have the burden of proving by a preponderance of the evidence that the jurisdictional amount requirement is met. *See McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). Defendants do not content that the actual damages suffered by any one of the plaintiffs or putative class members exceeds $75,000. Instead, they argue that (1) the plaintiffs' "common and undivided" interest in compensatory damages; (2) the cost of complying with the requested in-

junctive relief; and (3) plaintiffs' request for punitive damages, each meets the $75,000 amount-in-controversy requirement of 28 U.S.C. § 1332(a).

There is consensus among courts but dispute among commentators as to whether to apply the law of the transferee district of the transferor district to multidistrict litigation proceedings. Here, the transferor courts were sited in the Second, Seventh, Ninth, and Eleventh Circuits. In a leading case **[4]** on the subject, the District of Columbia Circuit held that "the law of a transferor forum on a federal question. . .merits close consideration, but does not have stare decisis effect in a transferee forum situated in another circuit." *In re Korean Airlines Disaster*, 829 F.2d 1171, 1176 (D.C. Cir. 1987), *aff'd on other grounds sub nom., Chan v. Korean Airlines Ltd.*, 490 U.S. 122 (1989). *But see* Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 Mich. L. Rev. 703, 705-6 (1995) (arguing that the law of the transferor forum should be applied). While the case law suggests that the law of the Ninth Circuit should be applied, the court has also considered the laws of the transferor districts in determining what is "ultimately a single proper interpretation of federal law." *In re Korean Air Lines Disaster*, 829 F.2d at 1175.

B. The "Common Fund" Exception to the "Non-Aggregation" Rule

In meeting the jurisdictional minimum, the separate and distinct claims of plaintiffs and class members may not be aggregated. *See Snyder v. Harris*, 394 U.S. 332, 335-36 (1969). Instead, "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount." *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973). Where, however, "several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest," their claims may be aggregated to reach the jurisdictional minimum. *Zahn*, 414 U.S. at 294 (quoting *Troy Bank v. G.A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1911)). *See also* 14B Charles Alan Wright et al., Federal Practice and Procedure § 3704 (3d ed. 1998). The paradigmatic cases permitting the aggregation of claims "are those cases which involve a single indivisible res, such as an estate, a piece of property (the classic example), or an insurance policy. These are matters that cannot be adjudicated without implicating the rights of everyone involved with the res." *Gilman v. BHC Securities, Inc.*, 104 F.3d 1418, 1423 (2d Cir. 1997) (citation omitted). *See also Eagle v. AT&T Co.*, 769 F.2d 541, 546-47 (9th Cir. 1985); *Potrero Hill Community Action Comm. v. Housing Auth.*, 410 F.2d 974, 979 (Cir. 1969).

[5] The plaintiffs here allege that the defendants misrepresented or withheld information about the cardholder rebate program and then wrongfully discontinued that program. No plaintiff or putative class member has a compensatory claim greater than $3,500. Defendants contend that the jurisdictional minimum is nonetheless met because plaintiffs have requested as damages an "'aggregate award' of 'class-wide damages' without reference to the damages incurred by any individual cardholder." Defs.' Resp. Order Show Cause (Dkt. # 119) at 8 (quoting Pls.' Suppl. Mem. Supp. Class Cert. (Dkt. #107) at 12-13). Defendants' argument focuses on the wrong issue: the "aggregate award" plaintiffs seek is a class action construct with no link to whether the plaintiffs shared a pre-litigation interest in the subject of the litigation. *See Gilman v. BHC Securities, Inc.*, 104 F.3d 1418, 1427 (2d Cir. 1997) ("Under the classic 'common fund' cases, what controls is the nature of the right asserted, not whether successful vindication of the right will lead to a single pool of money that will be allocated among the plaintiffs."). Each plaintiff's claim arises out of that plaintiff's contract with the defendants, each plaintiff may sue individually to recover from the defendants, and no plaintiff's claim implicates any other plaintiff's rights. Thus, the monetary claims asserted are not a "common and undivided interest" to enforce a "single title or right" for purposes of meeting the jurisdictional minimum under 28

minimum under 28 U.S.C. § 1332(a). *See Gilman*, 104 F.3d at 1428 ("these features of the case do not demonstrate a unitary claim; they merely reflect the problems of theory and proof in this case, and the named plaintiff's efforts to solve or plead around them"). The common fund exception to the non-aggregation principle is inapplicable, and thus, with respect to compensatory damages, defendants have not met their burden of proof concerning the amount in controversy.

C. Cost of Compliance with Injunctive Relief

Defendants next argue that the jurisdictional minimum is met because the cost to them of complying with the requested injunctive relief would be "significantly in excess of $75,000." Defs.' Resp. at 6. The injunctive relief sought by the plaintiffs is the "specific performance of the Rebate **[6]** Program to plaintiffs and Class members." Cons. Compl. (Dkt. # 18) at 13. Defendants argue that plaintiffs have a "common and undivided interest," that the injunctive relief sought "can only go to class plaintiffs as a class," Defs.' Resp. at 7, and that therefore the non-aggregation rule of *Snyder* and *Zahn* is inapplicable.

This argument is based on testimony that "the fixed costs in operating a rebate program for millions of cardholders," which exceed $75,000 per year, "would not depend on the extent of cardholder usage." Defs.' Resp. at 6. The injunctive relief sought, however, is simply a means to vindicate each plaintiff's separate and individual claim for accrual of rebates for five years. Plaintiffs' having made class action allegations does not alter the nature of the rights asserted. Where, as here, the nature and value of the injunctive relief sought is identical to the nature and value of the monetary relief sought, to permit aggregation of the former but not the latter would undermine the principles of *Snyder* and *Zahn*. *See Snow v. Ford Motor Co.*, 561 F.2d 787, 790-91 (9th Cir. 1977). Just as the compensatory claims may not be aggregated because the plaintiffs do not seek to enforce a common

and undivided interest, the injunctive relief based on those same interests may not be aggregated.

The "either viewpoint" rule pressed by the defendants and espoused by some courts—that the amount in controversy may be determined by the "value of the thing sought to be accomplished by the action[, which] may relate to either or any party to the action," *Ridder Bros., Inc v. Blethen*, 142 F.2d 395, 399 (9th Cir. 1944)—does not alter the result. Defendants have failed to show that the cost to them of allowing one cardholder to accrue rebates for the full five-year period, the required analysis under the non-aggregation principle of *Snyder* and *Zahn*, would meet the jurisdictional minimum. Whether determined from the plaintiffs' or the defendants' viewpoint, the defendants have failed to show that the value of the injunction enforced as to any one cardholder would exceed $75,000.

[7] D. Punitive Damages

Defendants also argue that the amount in controversy requirement has been met because of the plaintiffs' prayer for punitive damages. They do not contend that any plaintiff's recovery of punitive plus compensatory damages could reach $75,000 (at that level, a recovery for six million class members would be the absurd total of $450 billion); instead, they argue only that the claims should be aggregated. But, as with the requests for compensatory damages and injunctive relief, under *Snyder* and *Zahn* the total claimed as punitive damages may not be attributed to each individual plaintiff for purposes of satisfying the jurisdictional minimum. Defendants' argument rests heavily upon *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326 (5th Cir. 1995). There, the Fifth Circuit held that, under Mississippi law, "the full amount of alleged [punitive] damages [must] be counted against each plaintiff in determining the jurisdictional amount." *Allen*, 63 F.3d at 1333. While the Eleventh Circuit has adopted the state-law based rationale of *Allen*, *see Tapscott v. MS Dealer Serv. Corp.*, 77

F.3d 1353, 1359 (11th Cir. 1996), the other circuit courts to consider the issue have rejected the holding in *Allen*, *see Gilman v. BHC Securities, Inc.*, 104 F.3d 1418 (2d Cir. 1997); *Anthony v. Security Pac. Fin. Servs.*, 75 F.3d 311 (7th Cir. 1996), and the Fifth Circuit itself has stated that the result in *Allen* is peculiar to Mississippi law, *see Ard v. Transcon. Gas Pipe Line Corp.*, 138 F.3d 596, 602 (5th Cir. 1998).[3]

[8] As with injunctive relief, to permit the aggregation of punitive damages, when actual damages could not be aggregated, "would eviscerate the holdings of *Snyder* and *Zahn* and would run counter to the strict construction of the amount-in-controversy requirement those cases mandate." *Gilman*, 104 F.3d at 1431. Punitive damages are not the sort of "common fund" allowing for the aggregation of damages. One cardholder's ability to recover such damages against Ford or Citibank for the termination of the rebate program is not dependent on any another [sic] cardholder, and a recovery by one cardholder would not implicate the rights of any

[3] Contrary to the defendants' arguments, the Ninth Circuit has not addressed this issue. The Ninth Circuit's silence on the issue of aggregation when it vacated *In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 526 F. Supp. 887 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), does not mean that it agreed with the district court that aggregation of punitive damages was correct. The district court had offered alternative theories for the existence of diversity jurisdiction. 526 F. Supp. at 910-11. It cannot be said on what basis (if any) the Ninth Circuit found the jurisdictional minimum to be met. Furthermore, the court's approval of *Allen* in *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997) ("We agree with the Fifth Circuit."), in no way indicates an approval of *Allen*'s aggregation theory. *Singer* did not deal with aggregation of punitive damages, but instead involved whether and to what extent the court should look beyond the complaint and the removal petition to determine the amount in controversy. Because of the Ninth Circuit's holding in *Goldberg v. CPC Int'l. Inc.*, 678 F.2d 1365, 1367 (9th Cir. 1982), other courts have assumed that the Ninth Circuit would not permit aggregation of punitive damages. *See Ard v. Transcon. Gas Pipe Line Corp.*, 183 F.3d 596, 601 n.3 (5th Cir. 1998); *Haisch v. Allstate Ins. Co.*, 942 F. Supp. 1245, 1251 (D. Ariz. 1996).

other cardholder. For example, a cardholder who opted out of the putative class could seek punitive damages without regard for the disposition of the class suit.

Even under the rationale espoused by the Fifth and Eleventh Circuits, the nature of the state laws at issue in this case do not support the aggregation of punitive damages. Both circuits have held that the determination of whether the plaintiffs' claims to punitive damages are common and undivided is driven by state law. *See Cohen v. Office Depot, Inc.*, 184 F.3d 1292, 1295 (11th Cir. 1999); *Ard v. Transcon. Gas Pipe Line Corp.*, 138 F.3d 596, 602 (5th Cir. 1998); *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1358-59 (11th Cir. 1996); *Allen*, 63 F.3d at 1333-34. On a motion for rehearing, the *Allen* court emphasized this point. *Allen v. R & H Oil & Gas Co.*, 70 F.3d 26, 26 (5th Cir. 1995) (per curiam) ("[T]he panel is of the unanimous view that the opinion in this case specifically reflects a result under the Mississippi law of punitive damages and is not to be construed as a comment on any similar case that might arise under the law of any other state."). *See also Ard*, 138 F.3d at 602 (in distinguishing *Allen*, noting the "peculiar nature of Mississippi law").

It is disputed which state's (or states') laws will apply to the claims of the plaintiffs. *See* Defs.' Supp. Mem. at 8 n.2. The plaintiffs now claim that the laws of New York or South Dakota will apply. Pls.' Supp. Memo. at 4. In a well-reasoned opinion, the Second Circuit rejected the **[9]** aggregation of punitive damages under New York law. *Gilman v. BHC Securities, Inc.*, 104 F.3d 1418 (2d Cir. 1997). The court held that because a plaintiff cannot recover punitive damages under New York law unless he "asserts an underlying cause of action upon which a demand for punitive damages can be grounded," punitive damages may be aggregated only where the underlying cause of action may be aggregated, i.e., represents a common and undivided interest. *Gilman*, 104 F.3d at 1431. South Dakota's law of punitive damages is the same in this respect as New York's. *See*

Schaffer v. Edward D. Jones & Co., 521 N.W.2d 921, 928 (S.D. 1994). Thus, even under *Allen* and *Tapscott*, the plaintiffs here do not have a common and undivided interest in the monetary damages or injunctive relief sought, and punitive damages may not be aggregated.

III. CONCLUSION

For the reasons stated, defendants have failed to show by a preponderance of the evidence that the amount in controversy requirement of 28 U.S.C. §1332 has been met. The court therefore lacks subject matter jurisdiction over the consolidated complaint and the six removed cases. The consolidated complaint is hereby dismissed for lack of jurisdiction, and the six cases originally filed in state court, and removed to federal court by the defendants, are now remanded to state court as follows:

Copeland v. Ford Motor Co., No. C98-81 7WD, to the Circuit Court of Tuscaloosa County, Alabama (No. CV-97-970);

Essig et al. v. Ford Motor Co., No. C98-152WD, to the Supreme Court of the State of New York, County of Suffolk (No. 97-18514);

Hornreich et ux. v. Ford Motor C. et al., No. C97-1293WD, to the Superior Court of Washington for King County (No. 97-2-16935-6SEA);

LaGrou v. Ford Motor Co. et al., No. C98-226WD, to the Superior Court of the State of California, County of Los Angeles (No. BC180583);

McCauley v. Ford Motor Co. et al., No. C98-151WD, to the Circuit Court of Cook County, Illinois (No. 97L08315); and

Merrick v. Ford Motor Co. et al., No. C98-153WD, to the Circuit Court for the State of Oregon, County of Multnomah (No. 9708-06079).

[10] The clerk if directed to send copies of this order to all counsel of record.

Dated: October 29, 1999.

/s/
William L. Dwyer
United States District Judge